JA 221 LAW OF MILITARY INSTALLATIONS: DESKBOOK

TABLE OF CONTENTS

Chapter 1

Military Administrative Law

Section I Introduction

1-1. Administrative Law

Legal questions in military administrative law usually involve the interpretation of statutes and regulations and the rendering of advice to commanders and their staff officers. In the typical staff judge advocate office, opinions are prepared by the administrative law section. The advice given commanders or their staffs is not binding on them. Nevertheless, the author of an administrative law opinion should make clear the statutory, regulatory, or other basis for his advice so that the recipient can properly assess the ramifications of his proposed action. This handbook is written to assist the judge advocate in fulfilling this mission.

Section II

Basis for Military Administrative Law

1-2. Constitutional Authority

The United States Constitution grants fundamental military authority to Congress and the President.[1] All activities of the Army, including regulations, orders, and directives of every nature, are founded on this basic authority. Of course, it is manifestly impractical for either Congress or the President to participate individually in every affair of the Army. Military authority, therefore, is generally exercised by the Secretary of Defense, the Secretary of the Army, and subordinate officials.

1-3. Authority of the Secretary of the Army

Because the Constitution vests all military authority in Congress and the President, whatever authority the Secretary of the Army has must be derived from them.

a. Congress. Congress has conferred a great deal of authority directly on the Secretary, partly

by statutes prescribing specific responsibilities but primarily by a general provision granting, "the authority necessary to conduct all affairs of the Department of the Army."[2]

b. President. The President is expressly authorized to designate any executive branch official who is appointed by and with the advice and consent of the Senate to perform any functions vested in the President by law[3] unless delegation is affirmatively prohibited.[4] However, this provision does not limit the President's inherent right to delegate the performance of unrestricted functions vested in the President nor does it require express authorization in any case in which an act would be presumed in law to be done by authority or direction of the President.[5]

The President has expressly delegated many of Presidential functions to the Secretary of the Army by executive order or other writing. Many other presidential functions, however, are performed by

the Secretary without express delegation, either on the theory of an implied delegation of authority or under the alter ego doctrine.[6]

The alter ego doctrine does not require a true delegation of authority and, in fact, may be utilized to allow the Secretary to exercise some presidential functions which are actually nondelegable. The doctrine was established by the United States Supreme Court in recognition of the manifest impossibility of the President acting personally in each of the multifarious duties of Presidential office.[7] Under the alter ego doctrine, the act of the head of an executive department is presumed in law to be the act of the President.[8] Although the Secretary of the Army is the head of a military rather than an executive department, the principle is still considered applicable.

In performing presidential functions which are nondelegable, the Secretary specifies that the action is, "by direction of the President." However,

in performing delegable functions, the Secretary may take independent action.

c. The Secretary of Defense. Authority may also be delegated to the Secretary of the Army by the Secretary of Defense,[9] who, in turn, derives authority from the President or Congress.[10]

d. Delegation. In view of the magnitude of responsibilities placed on the Secretary of the Army, the impossibility of his dealing personally with each one is apparent. Obviously, the Secretary must delegate a great many of his functions to subordinates.

(1) Within the Secretariat. The Secretary is expressly authorized to assign such duties as is considered appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army.[11] The Secretary may assign any duties under this provision.

(2) Below the Secretariat. There is no general legislation authorizing the Secretary of the

Army to delegate functions vested in the Secretary to authorities below the Secretariat, although there are various statutory provisions authorizing such actions with respect to specific subjects.[12] Nevertheless, it is generally accepted that, even without statutory authorization, the Secretary may delegate ministerial functions, but not discretionary powers. Even in the case of discretionary authority, the Secretary may exercise discretion in the form of regulations establishing specific standards, and the application of such standards to particular cases is then treated as being ministerial.

1-4. Promulgation of Army Regulations

a. Authority. Many statutes relating to the Army contain specific provisions authorizing the issuance of implementing regulations.[13] In addition, the following general statutory provisions authorize their issuance:

The President may prescribe regulations to carry out his functions, powers, and duties under this title.[14] The President may prescribe regulations for the government of the Army.[15]

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.[16]

The Secretary [of the Army] may prescribe regulations to carry out his functions, powers, and duties under this title.[17]

Presently, Army regulations are issued "by order of the Secretary of the Army," over the signature block of the Chief of Staff of the Army, and authenticated by The Adjutant General. The signature of the Secretary of the Army or his designee is not regarded as essential.

b. Limitations. Because the Constitution expressly gives Congress rule-making power over the entire field of military administration but does not define the rule-making powers of the President as Commander in Chief, the executive branch is undoubtedly limited by any congressional action that has been taken. Therefore, to the extent Congress exercises its constitutional power to make rules for the government and regulation of the land and naval forces, it occupies the field, and the President, by exercise of his constitutional powers as Commander in Chief cannot encroach thereon. To the extent Congress has not occupied the field, the President's power is of necessity called into action.

Although Congress may not delegate its power to make a law, it may make a law permitting determination of some fact or state of things upon which action under the law may depend. In this way, Congress, provided it has set a sufficiently definite standard, can confer rule-making power upon

the President or other administrative officers. This is not a delegation of legislative power, but the conferring of the power to fill in the details of broad legislative standards. Such rule-making power need not be expressly conferred but may be implied as necessary to accomplish the broad legislative purposes sought to be obtained.

1-5. Command authority

Congress has authorized the Secretary of the Army to assign, detail, and prescribe the duties of members of the Army.[18] Command is exercised by virtue of the office and special assignment of members of the Army holding military rank who are eligible by law to exercise command.[19] Therefore, a civilian may not exercise command, and officers who are not eligible by statute may not exercise command.[20] The Secretary of the Army has also established other restrictions or grounds of ineligibility to exercise command,

such as being under arrest, being located at an installation where not permanently assigned, or being assigned to the General Staff or Department of the Army staff agencies.[21]

Command is normally connected with seniority in rank. Thus the senior officer of a unit or at an installation who is eligible for command is the commander. Rank is the relative position or degree of precedence bestowed on military persons which confers eligibility to exercise command or authority in the military service.[22] The chain of command is the fundamental organizational technique for the exercise of command and is simply the succession of commanders, superior to subordinate. At the head of the chain of command is the President, acting as the Commander in Chief. Staff and administrative officers are not in the chain of command. It is Army policy that each individual in the chain of command is delegated sufficient authority to

accomplish his assigned tasks and responsibilities.[23]

The actual scope of command has several sources. Some authority is given commanders by statute,[24] while most command authority is contained in various Army regulations.[25] It is also generally accepted that a commander has the inherent power to issue orders necessary for the accomplishment of his mission or for the welfare of his troops so long as such orders are lawful.[26] The scope of command authority is also limited to the personnel and the physical facilities which make up a particular command. Thus, a battalion commander may appoint a board to investigate battalion morale, but he cannot appoint one to investigate division morale.

Chapter 2

Law of Military Installations

Section I

Introduction

2-1. General

This chapter examines the law relating to military installations that, as used here, refers to fixed land areas controlled and used by military activities.[27] The materials in this chapter primarily apply to military installations in the United States under the control of the Secretary of the Army. Consequently, land areas used for nonmilitary purposes, such as Army civil works, are not directly discussed here. What is discussed in the pages that follow are the general rules regarding acquisition and disposal of military real property, the exercise of Federal legislative

authority over military land, and the extent of military authority to control activities on or near military installations.

Section II
Acquisition, Use, and Disposal of Property

2-2. Responsibility of the Corps of Engineers

The Chief of Engineers is the official custodian of legal documents concerning real property of the Army and Air Force, including documents pertaining to Federal legislative jurisdiction.[28] Consequently, the Corps of Engineers is responsible for questions about title to and jurisdiction over Army realty. The Corps of Engineers also has functional responsibility for most projects involving acquisition, modification, or disposal of Army realty interests or legislative jurisdiction over land, major construction projects, and state

attempts at annexation of installations.[29] Although The Judge Advocate General has a direct advisory and operating role in some of these matters,[30] the post judge advocate and installation commander do not have independent or primary authority for most actions involving real property.

2-3. Acquisition

a. Authority to acquire land. The Federal Government has inherent power to acquire land and related interests for its purposes.[31] Congress, which constitutionally has the power to dispose of and regulate Federal lands,[32] has limited the exercise of this power by Federal agencies unless expressly authorized by statute.[33] Accordingly, Congress has provided:

(1) No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law.[34]

(2) The service secretaries may obtain an option on land without limitation.[35] Although the service secretaries may acquire any other kind of interest in land needed for national defense without congressional approval where the cost does not exceed $200,000,[36] any acquisition in excess of that amount must be approved by Congress in the annual Military Construction Authorization Act which authorizes land acquisitions and construction projects on an individual basis.[37] This limitation also affects transactions in which land is obtained from other Federal agencies.[38]

(3) Military construction is also subject to congressional approval,[39] although minor military construction projects can be undertaken without seeking congressional approval on an individual basis.[40] Whether a project is minor is determined from time to time by Congress which decides what ceiling to place on minor construction projects.[41] Where a project will cost more than $500,000 the

project must be approved by the Secretary and Congress must be informed.[42] For smaller projects, operation and maintenance funds, up to $200,000, appropriated for the use of the military departments may be used.[43]

b. Methods of acquiring land. Lands needed for military use may be acquired from existing Federal resources or from private persons or State and local Governments. It is Army policy to obtain property in the most economical way and to maximize use of property already controlled by the Army and the other military departments.[44] The several methods of acquisition follow in order of the Army's relative preference for them:

(1) Donations.[45] The Secretary of the Army may accept donations of land for most military purposes[46] as well as donations conditioned on use for or in connection with a school, hospital, library, museum, cemetery, or other Army institution or organization.[47] State law may affect donations,

as, for example, where State law prohibits bequests of real property within the State to the Federal Government.[48] Where land cannot be obtained by donation, Army regulations favor acquisition by means of a long-term nominal lease.[49]

(2) Obtaining land from within the Federal Government. Land can be obtained from within the Federal Government in several ways. Reassignment of land from within the Army to a new organization or use is the easiest method of obtaining land and accords with Federal policy that favors reassignment.[50] Army regulations favor reassignment over donation,[51] thereby maximizing use of existing Army resources. Where land is not available within the Army, joint use of other Federal land with other agencies should be considered,[52] or, where the land will not be needed permanently, land can be obtained from other agencies for temporary use by "permit."[53] But where land is needed permanently and joint use is not possible, it is preferred that permanent

"transfer" of the land be sought from other military departments.[54] Before looking to other Federal lands, Army policy also prefers recapturing the use of lands in which the Army has an interest but which is occupied by someone outside the Federal Government.[55] Only when these alternatives are exhausted does Army policy permit obtaining land from other sources within or without the Federal Government.

The most abundant source of land in the Government outside the military departments is the public domain, which consists of the lands outside the original 13 States and Texas to which the United States originally acquired title and as to which ownership has not passed to the States in which the lands are located.[56] The President[57] may withdraw, reserve, or set aside portions of the public domain from the use of the Bureau of Land Management of the Department of the Interior[58] for the use of other agencies,[59] subject to the reservation of authority

in Congress to withdraw, reserve or set aside lands more than 5,000 acres in size for defense purposes.[60] An agency controlling public lands does not have absolute power over them. For example, the Secretary of the Interior, with the concurrence of the Administrator of General Services, decides whether excess lands will be returned to the public domain or sold[61] and, while the land is used by the agency, the Secretary of the Interior continues to control the mineral rights.[62]

Lands already under the control of Federal agencies may be transferred to the use of another agency. Congressional approval is required for transfers of lands purchased under a specific appropriation for a particular purpose.[63] One source of land is excess property no longer needed by an agency that can be transferred[64] subject to Federal Property Management Regulations.[65]

(3) Obtaining land from outside the Federal Government. Land may be obtained from sources

outside the Federal Government in any one of the ways discussed below.

(a) Purchase or lease. Land may be obtained by purchase or lease.[66] The nature of the Government's rights in purchased property is governed by State rather than Federal law.[67] The service secretaries may normally acquire any interest in land costing no more than $200,000 without specific congressional approval[68] and, when urgently needed, interests in land worth any amount.[69] Any other land purchases must be approved by Congress.[70] Before purchase, the Corps of Engineers must find the title valid.[71] Except for leases of family housing in the United States,[72] Guam or Puerto Rico and lease of property generally overseas,[73] there is no permanent statutory authority for the service secretaries to enter into leases. The General Services Administration has primary responsibility for leasing property for Federal use.[74] It must execute or approve leases for

property in urban centers as defined in the Federal Property Management Regulations[75] or where rented building space exceeds 2,500 square feet.[76] Some exceptions to this requirement are where the lease will be rent-free or for nominal consideration[77] or where no more than 2,500 square feet will be rented for a recognized special purpose.[78]

(b) Condemnation and requisition. The service secretaries may proceed in court to acquire any interest in land by condemnation, provided the project has been congressionally authorized.[79] Title to the land will vest immediately in the United States upon the filing of a declaration of taking and deposit in court of the Government's estimate of compensation.[80] Otherwise, title does not vest in the United States until final judgment and payment of compensation. In either event, possession of the property is pursuant to a court order. If a deposit

is made, the landowner has the right, subject to court approval, to withdraw the funds from the registry of the court. This does not prohibit the landowner from seeking additional compensation in the proceeding. If the final award of compensation is greater than the deposit, the landowner is entitled to interest on the difference. The nature of the Government's interest in the property is determined by the estate it sets forth in the condemnation proceeding.

Akin to condemnation is requisition, which is the taking of property under the law of war without resort to the judicial process.[81] Requisition is warranted only when circumstances will not permit delay and statutory action to achieve the same purpose would be too late.[82] In Youngstown Sheet & Tube Company v. Sawyer,[83] the President, based on necessity dictated by the Korean conflict, directed the Secretary of Commerce to seize most of the nation's steel mills when a general strike in the

mills was called. The Court held that absent congressional authority the President does not have emergency power to seize property. Congressional authority to the President to requisition is limited today.[84]

The fifth amendment requirement for compensation is not suspended by war.[85] For example, a lessee becomes entitled to just compensation for the property interest disturbed when a leasehold is requisitioned in wartime[86] (although the Governmental action may at the same time be a discharge from liability for rent accruing during the period of dispossession).[87] Just compensation for property taken for war purposes includes interest from the time of taking until full payment is made.[88] The cost of locating, excavating, and removing or exploding unexploded shells left buried in the ground is properly included as just compensation for use of land for purposes such as an artillery range.[89] The question sometimes arises whether there

has been a taking of private property where, for example, there are frequent overflights by military aircraft over private land. If the flights substantially burden the property and affect its use, the private owner will be awarded compensation by the courts.[90] A land owner who might seek compensation in the United States Claims Court is subject to a 6-year statute of limitations, which begins to run at the time of the taking.[91]

(c) Adverse possession. In Stanley v. Schwalby,[92] the Supreme Court held that the United States acquired title to disputed property in an action of trespass to try title that was brought against a post commander. The Court held that title passed based on the State statute of limitations which, while not ordinarily binding on the United States, can be relied on by the Government for its benefit.[93] Although The Judge Advocate General has questioned whether the United States can acquire

title by adverse possession,[94] Stanley has been followed by other courts.[95]

c. Incumbrances on title. Title is held in the United States, not any individual agency.[96] Although the purchase of land implies that the interest obtained will be a fee simple, there is authority to accept less. The Attorney General has the power to exclude outstanding interests for the benefit of third parties in condemnation proceedings.[97] A similar power exists with respect to other methods of acquisition.[98] Where, for example, highways, roads, railroad, utilities, or cemeteries are located on land to be acquired, these can be relocated, altered, vacated, abandoned, or the land can be acquired subject to existing easements for rights of ways and cemeteries.[99] The latter is preferred if there is no interference with the Federal use.[100] When there is interference, these and any other interests should be extinguished through normal acquisition procedures.[101]

Instruments conveying land to the United States sometimes contain declarations that the grant is made for a particular purpose. A declaration that does not expressly state a condition subsequent and provide for a right of reentry does not generally affect title if the land is applied to a different use.[102] In contrast, Etheridge v. United States[103] concerned a conveyance of land for "use and occupation as a site for a lifesaving station." Applying State law, the court construed the deed as creating a "fee determinable upon special limitation," a type of fee that needs no provision in the title for its expiration when the land is used for another purpose. Consequently, when the land ceased to be used for a lifesaving station, title automatically reverted and the Government became liable for rent. When a military reservation is so incumbered by a use limitation that it cannot be effectively used, reversionary rights of the grantor may be acquired by condemnation. If, in

addition to the use recited in the conveyance, property is used in a different manner, a reversion will not normally be triggered. For instance, property limited to military use ordinarily may be licensed temporarily without endangering the title.[104]

d. Heterogenous title structure. Most military installations are made up of a number of separate parcels or tracts acquired from different owners, by different methods, and at different times. Government real property acquisitions have tended to peak during periods of crisis, during and shortly after wars and during times of increased public activity. The heterogeneity of installation lands has significant practical and legal consequences. For example, the method by which each tract was acquired, as well as the time of its acquisition, may affect the legislative authority of the United States over the area. Substantive legal principles likewise may differ from tract to tract due to the

same factors. The physical appearance of a military installation tends to foster the conclusion that it is subject to uniform ownership and jurisdiction. But, each parcel or tract must be treated individually and judge advocates must know and understand where installation lands came from and what their boundaries are.

2-4. Disposal and granting use of military real property

a. General. Many of the considerations discussed earlier in connection with the acquisition and ownership of Government property are equally applicable to the disposition of that property. The contrasting concepts of title and control are intimately involved in the matter of military property disposition and use. As is true in the case of acquisition and ownership of real property, the United States, in disposing of real property and

granting its use, acts generally as would a private person.[105] As with acquisition, the disposition of Army real property is generally a technical operating function of the Corps of Engineers.

b. Responsibilities. Before Army property is disposed or its use granted to others, a determination must be made that it is excess to Army requirements or available for non-Army use.[106] The installation commander is involved in the initial action leading to this determination.[107] Ultimate responsibility for determining what real estate should be available for non-Army use[108] or which should be placed in an excess status[109] must be made by the Chief of Engineers. When such a determination has been made, preparation and assembly of the technical documents become a responsibility of the Chief of Engineers,[110] although there are certain instances where major commanders[111] and installation commanders[112] may authorize use of military property. Other Government agencies have

some authority over the use and disposition of Army property.[113] The staff judge advocate normally will have contact only with real property grants and disposition when disposition or granting authority is given to the major command or installation commander, although the staff judge advocate may have input in the initial command determination to declare property available for non-Army use or excess.

Except as authority is otherwise vested in the major command or installation commander, the Chief of Engineers or a designated representative approves, executes, and distributes instruments concerning temporary use of real estate; otherwise, they are locally prepared and submitted for review by The Judge Advocate General and execution in the office of the appropriate Assistant Secretary of the Army.[114]

c. Statutory authority. The Secretary of the Army cannot convey to any State or person any

interest in land belonging to the United States unless authorized expressly or impliedly by Congress.[115] Licenses, permits, and transfers to other Government agencies do not, however, dispose of property.

Because statutory authority is required to dispose of Government property, title may not be obtained from the United States by adverse possession. Hence, the Federal Government is not bound by a State statute of limitations, even one which purports to apply to the United States.[116] Accordingly, private occupancy of public land, no matter how long continued, will not deprive the Government of its title.[117]

The Army cannot lease real property if the estimated annual rental would exceed $200,000, or transfer it to another agency or report it as excess if its estimated value exceeds that amount, until 30 days after reporting the transaction to the Committees on Armed Services.[118]

d. Permit. A permit gives temporary use of land from one Government agency to another.[119] The temporary use must not interfere with the original intended use. The Secretary of the Army is empowered to grant permits.[120] Virtually permanent permits may be given to other departments if the grant would be in the Army's interest and the land would remain subject to Army regulation and control. An irrevocable change in use requires a "transfer."[121] An interim permit may be issued pending a transfer.

Major commanders may agree to let Air Force and Navy commands use Army Reserve facilities.[122] Generally, non-DOD Federal agencies are required to pay fair market rental for use of land and buildings on Army installations unless the use falls within one of the following exceptions:

(1) Real property and related services provided to an organization that solely supports or substantially benefits the installation's mission;

(2) Land held under a permit issued prior to 1 October 1986;

(3) Permittee's activity benefits or enhances the national defense;

(4) Cases in which the income produced by a charge is less than the expense of administering the charge; or

(5) Permits in the nature of an easement granting a right-of-way for roads, pipelines, cables, or similar purposes.[123]

The permitting agency absorbs costs for repair or restoration after the return of the land because the using party cannot apply its appropriations to land controlled by another agency.

Where the Army is a permittee, land granted to it by another agency will be returned by the Chief of Engineers, or a representative, to the permitting agency when no longer needed, unless other disposition is provided for by law or regulations.[124]

e. Transfers to Federal agencies. A transfer accords permanent irrevocable use of land coupled with the authority to control and regulate all aspects of the land. Army regulations refer to the transfer of real property as a disposal of real estate, although such a transaction merely involves a loss of control by the Army rather than a relinquishment of ownership by the United States.[125]

Normally, Federal agencies are required, pursuant to the Federal Property and Administrative Services Act of 1949,[126] to report excess real estate under their control to the General Services Administration which then supervises and directs the disposal of the property.[127] To maximize use of available Government land, the General Services Administration will transfer excess property to another agency with a use for it, followed by reimbursement by the receiving agency to the transferring agency for the fair value of the property.[128] The Army, however, can transfer real property, without compensation, to the

other armed services or other defense agencies without going through the General Services Administration.[129] Transfers of real property in excess of $200,000 under the control of the Army must be reported prior to the transaction to the Committees on Armed Services of the Senate and House of Representatives.[130]

Federal agencies often exchange lands. For example, the Secretary of Agriculture and the Secretary of a military department may, without reimbursement exchange lands within or adjacent to national forests if it will facilitate land management and provide maximum use of the land for authorized purposes.[131]

f. Licenses. A license is the minimal authority to act on the land of the licensor without possessing or acquiring any estate therein. Licenses may be revoked at any time. A license simply legalizes an act which would otherwise be a trespass.[132] Most licenses affecting military

reservations are informal and unwritten. As a license does not involve the grant of an interest in land, it may be executed under the general administrative authority of the Secretary of the Army, provided it will be of direct benefit to the Government.[133] The post commander, however, may not act if, for example, a license would essentially be a lease or an easement.[134] In these cases, the easement or leasing statutes apply and the same requirements with respect to obtaining rentals or consideration will apply to the license as they do in the case of the easement or lease.

Licenses may be granted under the Secretary of the Army's administrative power to explore for (but not remove) minerals on acquired lands.[135] Government poles and underground conduits for utility and communication lines serving the Government exclusively can be used by private concerns.[136] ROTC units and other Department of Defense elements may be permitted to use Army Reserve Centers under

certain conditions,[137] as may local civic and similar nonprofit organizations[138] as such use promotes public relations in communities where Army Reserve Centers are located. There is statutory authority for the Secretary of the Army to permit qualified institutions to excavate ruins or archaeological sites and to gather objects of antiquity.[139] Statutory authority also exists for the grant of licenses to the American National Red Cross and the Young Men's Christian Association to erect buildings on military reservations.[140] Federal law permits the granting of licenses to States for the use and occupancy of installations, or portions thereof, by the National Guard.[141] Licenses recently have been granted for community antenna television systems pursuant to the authority to grant an easement for rights of way.[142] While the statute allows easements to be granted for 50 years, it is the policy to grant licenses for periods not to exceed 10 years.

Major commanders may permit veterans' conventions to use certain Army real property if the property includes unoccupied barracks.[143] They may also grant revocable licenses for not more than 30 days for joint use of Active Army and Army Reserve facilities during civil disturbances to the National Guard and to city, county, and State officials and law enforcement agencies.[144] The licensing authority of installation commanders is more limited.[145] This includes the grant of licenses for bus and taxicab service on installations,[146] permission for Government contractors to erect structures while performing a contract,[147] furnishing space for Red Cross activities,[148] assigning space for exchange concessionaires,[149] granting permission to hunt, fish, or trap,[150] granting meeting room facilities for youth groups,[151] the assignment of quarters,[152] permitting the extension of public utility facilities upon military reservations,[153] and assigning space for

banking facilities[154] and, without charge or rent, to credit unions.[155]

As noted earlier, other agencies have statutory authority to grant some licenses over military reservations for certain purposes, normally with the approval of the Secretary of Defense or the head of the military department. Only the Secretary of the Interior may permit the disposal or exploration for mineral interests in Army property that has been set aside from the public domain.[156] The Secretary of Transportation may make available to States the use of portions of military installations as a source of materials for the construction and maintenance of certain roads.[157] Licenses for water power projects upon military installations may be granted by the Federal Power Commission.[158]

A license does not justify any use of the property other than that specified in the grant. It is personal and not assignable, and a transfer of the license voids the grant. There is no policy

against collection of fees by the licensee as long as any conditions imposed by the Chief of Engineers with respect to such fees are met. A license granted by an installation commander logically may be revoked at any time. Formal notice or a bar to entry to an installation should have the effect of revoking the license. If necessary, judicial proceedings ought to be brought to have a licensee ejected and the property removed. Abandonment or relinquishment (following the discontinuation of service) of the license makes formal notice of revocation unnecessary.

g. Leases. Military leases will be for a period not exceeding 5 years unless the Secretary of the Army determines that a longer period will promote the national defense or will be in the national interest.[159] There must always be a definite place rented, and the tenant should be granted an interest in the place or the right to exclusive possession. Accordingly, an instrument whereby the Secretary of

the Army purported to lease a given number of square feet of floor space in a depot, without regard to location, was in legal effect not a lease but a mere license.[160] The principal authority for leasing military property to private interests is the Military Leasing Act:[161]

> (a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is--
>
> (1) under the control of that department;
>
> (2) not for the time needed for public use; and
>
> (3) not excess property, as defined by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. ✍472).
>
> (b) A lease under subsection (a)--

(1) may not be for more than five years unless the Secretary concerned determines that a lease for a longer period will promote the national defense or be in the public interest;

(2) may give the lessee the first right to buy the property if the lease is revoked to allow the United States to sell the property under any other provision of law;

(3) must permit the Secretary to revoke the lease at anytime, unless he determines that the omission of such a provision will promote the national defense or be in the public interest; and

(4) may provide, notwithstanding section 321 of the Act of June 30, 1932 (40 U.S.C. ✍303b),[162] or any other provision of law, for the maintenance, protection, repair, or restoration, by the lessee, of the property leased, or of the entire unit or installation

where a substantial part of it is leased, as part or all of the consideration for the lease.

(c) This section does not apply to oil, mineral, or phosphate lands.

(d) (1) Except as provided in para. (2), money rentals received by the United States directly from a lease under this section shall be covered into the Treasury as miscellaneous receipts.[163] Payments for utilities or services furnished to the lessee under such a lease by the department concerned may be covered into the Treasury to the credit of the appropriation from which the cost of furnishing them was paid.

(2) Money rentals . . . from a lease . . . for agricultural or grazing purposes of lands under the control of . . . a military department . . . may be retained and spent by the secretary . . . to cover the . . . expenses of leasing . . . and to cover the financing of multiple-land

use management programs at any installation. . . .

(e) The interest of a lessee of property leased under this section may be taxed by State or local Governments. A lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local Governments under an act of Congress, the lease shall be renegotiated.

(f) . . . [R]eal property and associated personal property, which have been determined excess as a result of a defense installation realignment or closure, may be leased to State or local Governments . . . if (1) . . . such action would facilitate State or local economic adjustment efforts, and (2) the Administrator of General Services concurs in the action.

Unless otherwise directed by the Secretary of the Army, consideration for leases will be not less than the appraised fair market rental value.[164] Moreover, Army real estate will not be privately leased until competition for its use is sought through advertising. An exception to this policy is a lease of property to utilities.[165] The Secretary of the Army also may waive competition when waiver would promote the national defense or would be in the public interest, or where competition is impracticable. Projected leases involving an estimated annual rental of more than $200,000 must be reported to the Committees on Armed Services.[166]

The usual stipulations between landlord and tenant, reasonably necessary for the proper execution of the power to lease the property, may be required so long as the stipulation is germane, not unusual, and reasonably advantageous to the Government.[167] The Secretary also may write a nonassignment clause into the contract although

subleases may be permitted.[168] With certain exceptions, leases should provide for revocation by the Secretary of the Army at any time.[169]

The Secretary of the Army may modify leases when it is advantageous to the Government and not solely for the benefit of the lessee.[170] If the modification is not advantageous to the Government, there must be some new consideration from the lessee. The Secretary cannot relieve the lessee from accrued rent, adjust rental already paid, or relieve any obligations due the Government under the lease.

There is some question concerning the Government's right to terminate a lease. A good reason to terminate, for example, would be a desire to dispose of the property free of the lease. But, where no reason is given, the termination appears arbitrary. United States v. Blumenthal[171] held that the Government has the same rights as any private landowner:

> The fact that the plaintiff [United States] gave no reason for its notice to quit and sought to evict the defendant while renting other similar business properties to other tenants on a similar month-to-month basis is said to amount to discrimination against the defendant which was not arbitrary as to deny him due process of law. But the plaintiff, which is here acting in its proprietary rather than its Governmental capacity, has the same absolute right as any other landlord to terminate a monthly lease by giving appropriate notice and to recover possession of the demised property without being required to give any reason for its action. . . . Certainly the owner of land is not put to the election of evicting all his tenants or none of them. . . .[172]

The Judge Advocate General has advised that the Secretary of the Army may authorize a subordinate to execute leases in his or her name pursuant to a precise delegation of authority. Accordingly, the Chief of Engineers has been delegated substantial leasing authority. Installation commanders are authorized by regulations to lease quarters to certain civilian employees and other nonmilitary personnel[173] and trailer sites to military and civilian personnel.[174]

h. Easements. An easement grants use of real property for specified purposes for a specific term or in perpetuity. Limitations on the purposes for which and conditions upon which the Army may grant an easement plus the fact that the grantor continues to use the real property, to the extent use does not interfere with the grantee's use, distinguishes an easement from a lease.[175]

The Secretary of the Army has substantial statutory authority to grant rights-of-way and

easements in military real property, including but not limited to 50-year easements for transmission of electric power and for radio, telephone, television, and other forms of communications,[176] easements for water, oil, gas, and sewer pipelines,[177] easements for railroad tracks, and easements for roads and streets and any other rights-of-way.[178] Special provisions permit easements for ferry landings and bridges, for driving livestock across military reservations,[179] and for river and harbor improvements facilitated by land exchanges between the Government and private persons.[180]

Other agency heads can grant easements and rights-of-way over military reservations. The Secretary of the Interior can grant easements over military lands of many types, including utilities, tunnels, pipelines, and access to natural resources.[181] The Department of Transportation, can, as another example, grant rights-of-way to States

for the construction and maintenance of roads on or adjacent to military installations.[182]

Although statutes authorizing rights-of-way or easements do not require that compensation be paid to the United States, grants should be conditioned on consideration equal to the fair market value.[183] Exceptions are grants to State and local Governments or grants that serve the public interest or benefit the Federal Government. Grantees must also repair or restore damage done to Federal land or improvements and relocate, replace, or compensate for buildings rendered useless or less useful by the easement.[184]

i. Disposition of fee interests. The Federal Property and Administrative Services Act of 1949[185] is the principal authority for disposing of fee interests in Army real property. Each Federal agency shall report excess real estate to the General Services Administration, which supervises and directs the disposition of surplus real estate.

Real estate that is to be disposed of is classified as either excess or surplus. Property is "excess" when it is no longer required for foreseeable DA needs and "surplus" when it is determined to be not needed by any Federal agency.[186] It is Army policy to promptly dispose of real estate that is not needed to fulfill immediate or foreseeable requirements.[187]

Where the Army is authorized by a specific statute to dispose of real estate, the disposition, so far as practicable, will be accomplished in accordance with the provisions of the 1949 Act and implementing regulations. There are several statutes which permit the Secretary of the Army to dispose of real property. The principal statutes authorizing disposal by the Secretary of the Army are set out in Appendix C, Army Regulation 405-90. In addition, by regulation, the Secretary of Defense or Army may, pursuant to a delegation of authority granted by the Administrator of General Services, dispose of real property having a total estimated

fair market value, including all components of the property, of less than $15,000.[188]

Generally, the procedure for effecting a change in the status of Army real property is for the installation commander to submit a recommendation, through channels, to the Chief of Engineers. If the Chief of Engineers determines that no requirements exist, the District Engineer with responsibility over the area where the installation is located and the major command having jurisdiction over the installation may dispose of the property.[189]

The Chief of Engineers is responsible for the disposition of excess and surplus real estate located in the United States, Puerto Rico, the Panama Canal Zone, and the Virgin Islands when the DA has been authorized by statute to dispose of such property,[190] and for providing for the temporary utilization of such excess and surplus real estate pending its disposition when disposition is to be made by the General Services Administration.[191] No

using agency is authorized to take any disposal action pertaining to excess and surplus real estate or to make any commitments pertaining to the disposition of such real estate.

When the DA is authorized to dispose of real property, its policy is to effect a sale only after competitive bidding, normally accomplished through advertising.[192] The Federal Property and Administrative Service Act of 1949 authorizes exchanges of property in lieu of monetary consideration.[193] The usual practice of the DA is to convey only by quitclaim deed. When a properly executed deed is delivered to the grantee pursuant to the agreed terms of the sale, the transfer of title is accomplished.

Section III
Legislative Jurisdiction

2-5. Introduction to legislative jurisdiction

a. Meaning of Federal jurisdiction.

"Jurisdiction" here refers to the authority to legislate within a geographically defined area.[194] When the United States exercises Federal jurisdiction over particular land, it can enact general, municipal legislation applying within that land. There is other legislative authority that Congress may exercise based not on jurisdiction over land, but upon subject matter and purpose.[195] In either event, congressional authority must trace back to some specific grant in the Constitution.

Federal jurisdiction is different from Federal ownership of land. It is possible for the United States to exercise Federal jurisdiction over land it does not own.[196] Conflicts occasionally develop between the exercise of Federal jurisdiction and incidents of ownership. On occasion, the Government may exercise its legislative powers over land, contradicting a previous exercise of authority as a

landowner. In one instance, a Government lease of land permitted the sale of liquor on the premises. Based on the principle that Governmental powers cannot be contracted away, however, a subsequently promulgated regulation lawfully forbade liquor sales on the same property despite the terms of the lease.[197]

The fact that the United States has legislative jurisdiction over a particular area does not mean that it has actually legislated with respect to it, but merely that it has the authority to do so. In fact, the Government has not comprehensively legislated for areas under its jurisdiction. Moreover, in some important respects, it has allowed State law to apply in some areas.

b. Types of legislative jurisdiction. The Federal Government does not always have the exclusive power to legislate when it has jurisdiction. Some State legislative authority may remain. The documents that vest jurisdiction in the

United States indicate the measure of legislative jurisdiction obtained. The types of jurisdiction can be classified according to the following categories:[198]

(1) Exclusive legislative jurisdiction. "Exclusive legislative jurisdiction" arises where the Government has received all the authority of the State to legislate with no reservation by the State of any authority except the right to serve civil and criminal process.[199] By statute, Congress allows some State laws to operate on enclaves (areas of exclusive legislative jurisdiction) even where the State has not reserved the right to exercise such powers. This is not an exercise of State authority but rather of Federal authority.

Since there are disadvantages to exclusive Federal jurisdiction,[200] it should be sought only when State or local laws interfere with military operations.[201]

(2) Concurrent legislative jurisdiction. "Concurrent legislative jurisdiction" arises where, in granting to the United States authority that would otherwise amount to exclusive legislative jurisdiction over an area, a State reserves the right to exercise authority concurrently with the United States.

While Army policy discourages the acquisition of concurrent jurisdiction, it may be justified for installations of great size, with a large population, in a remote location or, where, because of peculiar requirements stemming from Army use, the State or local Government does not have the resources to administer the area.[202]

(3) Partial legislative jurisdiction. "Partial legislative jurisdiction" arises where the Federal Government has been granted some legislative authority over an area by a State which reserves to itself the right to exercise, alone or concurrently with the United States, other authority constituting

more than the right to serve civil or criminal process in the area. In other words, either the Federal Government, or the State, or both, have some legislative authority but less than complete legislative authority. An example would be where a State reserves only jurisdiction over criminal offenses, allowing the United States to exercise all other sovereign rights concurrently with the State, but denying it legislative jurisdiction over crimes.

For example, Iowa grants that:

> The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise jurisdiction thereover but not to the extent of limiting the provisions of the law of this state. This state reserves . . . jurisdiction, except when used for naval or military purposes, over all offenses committed

thereon against its laws and regulations and ordinances. . . .[203]

Thus, Iowa has reserved all criminal jurisdiction while otherwise granting the United States concurrent jurisdiction.

Conversely, a Minnesota statute states that ". . . the jurisdiction of the United States over any land or other property within this state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state . . . to punish offenses against its laws committed therein. . . ."[204] The United States thus has complete jurisdiction over the particular area with Minnesota reserving concurrent jurisdiction to punish criminal offenses.

States can have partial jurisdiction in areas other than criminal law. For example, Virginia has reserved the power to exclusively "license and regulate, or to prohibit, the sale of intoxicating

liquors"[205] on any lands the United States has acquired for its use.

(4) Proprietorial interests. The term "proprietorial interest" describes situations where the Federal Government has acquired some degree of ownership of an area in a State but has not obtained any measure of the State's legislative authority over the area. Congress may have authority to act with respect to activities on this land flowing from independent constitutional authority, but it cannot act through its power to exercise legislative jurisdiction.

c. Significance of Federal jurisdiction. Legal questions about legislative jurisdiction must be considered on a tract-by-tract basis because different measures of jurisdiction apply to parcels of land acquired at different times. The local District Engineer may be requested to help determine the location of particular tracts of land and documents pertaining to them.[206] Whether Federal

legislative jurisdiction exists in some measure will determine if Federal or State laws, or both, apply on the area. For example, jurisdiction will determine whether Federal or State courts will have jurisdiction over criminal defendants. The power of the State to tax persons and private property on the installation as well as the applicability of State civil laws generally will be dependent on the measure of jurisdiction. Importantly, jurisdiction will also significantly affect the ability of State administrative and law enforcement officials to act on the reservation. Further, some Army regulations and policies are tied to the jurisdictional status of installations.[207]

Holt v. United States[208] illustrates difficulties involved in proving Federal legislative jurisdiction over a particular portion of military reservations. The defendant was indicted in a Federal court for a murder committed within the Fort Worden Military Reservation, "a place under the exclusive

jurisdiction of the United States." The evidence showed that the offense was committed in a "band barracks" which a witness testified was "described in certain condemnation proceedings." The condemnation proceedings and a map were introduced to prove ownership of the site as was evidence that the State of Washington had assented to the purchase, showing cession of jurisdiction. The evidence sufficed to show exclusive jurisdiction, even though the evidence would not have been sufficient in a suit to try title.[209]

In Krull v. United States,[210] two defendants were tried for offenses committed in that part of the Chickamauga and Chattanooga National Military Park in Georgia allegedly under exclusive Federal jurisdiction. To prove that the entire Georgia portion of the Park was under exclusive Federal jurisdiction, the prosecution introduced maps, title documents, and official books and records.[211] One witness identified the situs of one of the offenses

as being within "Land Lot No. 134," and court files and records in the condemnation proceedings whereby title to this tract was acquired were introduced. The court ruled that ". . . the Government was not required to prove its title, as in an action of trespass, . . ."[212] Consequently, the court did not allow technical objections to the Government's proof of title such as lack of approval of title by the Attorney General,[213] proof that a former owner received the award in condemnation proceedings,[214] and objections to the admissibility of the deeds and muniments of title because of improper proof of execution.[215]

d. Military installations in territories and possessions. The term "exclusive Federal jurisdiction" normally refers to Federal legislative authority over enclaves within the States. Jurisdiction over territories has a different constitutional basis.[216] In a general sense, the Federal Government has legislative power over all

territorial areas whether on or off Federal installations and whether under public or private ownership. Territorial Governments have been regarded as representatives of the Federal Government, exercising delegated power. Consequently, territorial Governments do not enact laws transferring jurisdiction to the Federal Government, as has been done by the States. Puerto Rico is the single exception. In 1903, it enacted a territorial law ceding legislative jurisdiction over military installations and similar lands to the Federal Government and providing that "all jurisdiction over such lands by the People of Puerto Rico shall cease and determine." These or similar provisions continued in effect until and after the former territory became a Commonwealth in 1952. The effect of acquiring exclusive jurisdiction under these provisions is to prevent the exercise of legislative authority by the Commonwealth of Puerto Rico over the areas affected.[217]

2-6. Acquisition of legislative jurisdiction

a. Methods of acquisition. There are three methods of acquiring Federal legislative jurisdiction over areas within a State: purchase with the consent of the State, cession of jurisdiction by the State, and reservation of Federal legislative jurisdiction at the time the State is admitted to the Union.

(1) Purchase with consent of the State. The earliest recognized method by which the United States could acquire legislative jurisdiction was the purchase of real property with the consent of the State in which it was located. This method is provided for by the Constitution in the following terms:

> The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever,

> over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .[218]

Because the requirement for State consent was deliberately inserted in the Constitution, it is not possible for the United States to unilaterally acquire Federal jurisdiction over land in a State. The required consent must be given by the State legislature[219] either before or after the purchase.[220] Note that the Constitution does not specify that the land purchased by the Government be State-owned

land. It only requires that the State consent to the purchase.

Although the constitutional provision appears to apply only where the property in question has been purchased, that is, where the Government has bought and paid for real property, acquisitions by condemnation[221] and a conveyance of land for consideration of one dollar[222] have been regarded as "purchases." Donations of land to the United States are purchases[223] as are State cessions of land.[224] On the other hand, the word "purchase" has not included the lease of real property[225] or other acquisitions of less than a fee interest.[226]

The United States may acquire Federal jurisdiction under the "exclusive legislation" clause only if the purchase of land is ". . . for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ."[227] There are indications of early attempts to read this clause restrictively, according to the rule of

ejusdem generis.[228] But the phrase was broadly construed by the Supreme Court in James v. Dravo Contracting Company:[229]

> . . . Are the locks and dams in the instant case "needful buildings" within the purview of Clause 17? The State contends that they are not. If the clause were construed according to the rule of ejusdem generis, it could be plausibly contended that "needful buildings" are those of the same sort as forts, magazines, arsenals and dockyards, that is, structures for military purposes. And it may be that the thought of such "strongholds" was uppermost in the minds of the framers. . . . But such a narrow construction has been found not to be absolutely required and to be unsupported by sound reason in view of the nature and functions of the national Government which the Constitution established.

> . . . We construe the phrase "other needful buildings" as embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government. . . .[230]

(2) Cession by the State. The Constitution expressly recognizes only one method of acquiring jurisdiction: purchase with the consent of the State. The early view was that this was the only method for the transfer of jurisdiction.[231] Nevertheless, various States enacted laws attempting to cede jurisdiction over Federal lands. The difference between consent and cession statutes is illustrated by these examples:

> 15-301. (25) Cession to the United States of land for public buildings, forts, etc.--The consent of the State is hereby given, in accordance with the 17th clause, section 8 of Article I, of the Constitution of the United

States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any lands in this State which have been or may hereafter be acquired for sites for customs houses, courthouses, post offices, or for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. . . .

15.302. (26) Jurisdiction.--Exclusive jurisdiction in and over any lands so acquired by the United States is hereby ceded to the United States for all purposes except service upon such lands of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than said United States shall own such lands. . . .[232]

In 1885, the Supreme Court, in Fort Leavenworth Railroad v. Lowe,[233] held cession could transfer jurisdiction. A Kansas statute ceded legislative

jurisdiction over Fort Leavenworth but reserved the right to serve criminal and civil process on the reservation and the right to tax railroad, bridge, and other corporations and their franchises and property on the reservation. A railroad on Fort Leavenworth had sued in State court to recover taxes paid to the State, arguing that the State could cede exclusive jurisdiction but that the State could not reserve the right to tax. The State argued that a unilateral cession of jurisdiction was void ab initio. The Supreme Court sustained the cession of jurisdiction and the reservation of the right to tax:

> . . . We are here met with the objection that the Legislature of a State has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the Constitution from her consent to a purchase by the United

States for some one of the purposes mentioned. If this were so, it would not aid the railroad company; the jurisdiction of the State would then remain as it previously existed. But aside from this consideration, it is undoubtedly true that the State, whether represented by her Legislature, or through a convention specifically called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the General Government. The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. . . . In their relation to the General

Government, the States of the Union stand in a very different position from that which they hold to foreign Governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country; and the two, the State and general Government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interest of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general Government, they are, as already said, exempt from such control of the State as would defeat or impair their use for those purposes; and if,

> to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. . . .[234]

Cession is not subject to the restraints which attend purchase with the consent of the State under the Constitution. The land need not be "purchased," nor need it be intended for one of the uses specified in the Constitution. Thus it is permissible for a State to cede exclusive jurisdiction over lands reserved for military purposes from the public domain,[235] over a railroad right-of-way passing through Government lands,[236] or over privately owned land within the confines of a Federal reservation.[237] Importantly, the State may

cede jurisdiction over property held by the Government under lease.[238]

(3) Reservation when the State is admitted to the Union. Legislative jurisdiction also can be retained by the Federal Government when it surrenders land to the States. The Supreme Court recognized this in Fort Leavenworth Railroad v. Lowe:[239]

> . . . Congress might undoubtedly . . . upon [admission of Kansas to the Union] have stipulated for retention of the political authority, dominion and legislative power of the United States over the Reservation, so long as it should be used for military purposes by the Government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general Government.[240]

Congress has in various instances reserved jurisdiction over specified areas in the enabling act admitting a State to the Union.[241]

b. State reservations of authority. Early cases held that the Government could acquire only exclusive jurisdiction.[242] In 1885, Fort Leavenworth Railroad v. Lowe[243] held that a State could reserve some measure of jurisdiction while giving the Federal Government legislative jurisdiction:

> . . . As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the

> United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post.[244]

Recall that jurisdiction over Fort Leavenworth passed to the United States through a unilateral cession statute. Doubts continued to be expressed after Fort Leavenworth Railroad concerning the right of a State to include reservations and qualifications in a consent statute.[245] The matter was put to rest in 1937 by James v. Dravo Contracting Company,[246] sustaining a reservation by West Virginia, in a consent statute, of the right to levy a gross sales tax with respect to work done in a federally owned area:

> . . . Clause 17 [of the Constitution] contains no express stipulation that the consent of the

> State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.[247]

Whether a consent or a cession statute passes jurisdiction, no State reservation can be "inconsistent with the free and effective use" of the property for Federal purposes.[248] This is just another way of stating that the supremacy clause of

the Constitution[249] does not permit a State to interfere with essential Federal functions. States have long imposed reservations and conditions, even before Fort Leavenworth Railroad and Dravo Contracting Company. States may reserve concurrent jurisdiction, or less jurisdiction, such as authority to apply State criminal laws, tax private persons, regulate water rights, extend State suffrage laws, or apply civil laws. It is always necessary to examine State consent or cession laws for reservations and qualifications.[250]

c. Procedural requirements in State statutes. A number of State consent and cession statutes transfer legislative jurisdiction on condition that there be filed a deed, map, plat, or description pertaining to the land involved in the transfer, or that some other action be taken by Federal or State authorities. Some of these provisions have been held to be mere formal requirements, noncompliance with which do not vitiate the transfer of

legislative jurisdiction.[251] More recently, however, courts have viewed requirements of this nature as substantive and, if not complied with, jurisdiction does not pass. In Paul v. United States[252] the Supreme Court assumed without discussion that a condition in a State cession law requiring ". . . that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office or record in the country in which the same are situated . . ." was substantive and must have been complied with by the United States to obtain jurisdiction. The United States Court of Appeals for the Fourth Circuit, in United States v. Lovely[253] considered whether the United States lacked jurisdiction over land because it had not complied with a requirement in a cession statute that title be recorded. In dicta, court stated:

> . . . If the . . . statutes upon which Lovely relies to defeat jurisdiction . . . were the

> only statutes covering the subject of the cession of jurisdiction to and the vesting of jurisdiction in the federal government, we would not hesitate to declare that the court in which Lovely was convicted did not have jurisdiction because of the failure of the Government to record evidence of title and we would hold, accordingly, that the motion to vacate the judgment and sentence should have been granted . . . .[254]

d. Acceptance of jurisdiction by the United States. Although States may purport to unilaterally grant legislative jurisdiction to the United States, the assent of both parties to the transaction is required.[255] By a 1940 statute, the head of the department having control over Federal land must expressly accept jurisdiction; otherwise, it is conclusively presumed that no Federal jurisdiction of any kind is accepted:

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it, shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner

> as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.[256]

Before the 1940 statute, it was held in the absence of indications to the contrary that since the transfer of jurisdiction conferred a benefit on the United States, acceptance would be presumed. In Mason Company v. Tax Commission[257] a State occupation tax was imposed on a Government contractor who was building a dam over navigable waters. Contracts between the Government and the contractor provided that State laws were to be followed. In holding there was no implied acceptance of jurisdiction by the United States, the Court stated:

> . . . As such transfer rests upon a grant by the State, through consent or cession, it follows, in accordance with familiar principles applicable to grants, that the grant may be accepted or declined. Acceptance may be presumed in the absence of evidence of a contrary intent, but we know of no constitutional principle which compels acceptance by the United States of an exclusive jurisdiction contrary to its own conception of its interests. . . .
>
> The Federal intent in this instance is clearly shown. It is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress, which gives the force of law to the prior officials even if unauthorized when taken.[258]

Mason Company pointed up a growing reluctance to apply a presumption of acceptance of jurisdiction.

In Atkinson v. State Tax Commission,[259] the Supreme Court indicated that the enforcement of the Oregon workmen's compensation law in a Federal area was incompatible with exclusive Federal jurisdiction, and, since the Federal Government did not seek to prevent the enforcement of this law, the presumption of Federal acceptance of legislative jurisdiction was effectively rebutted.

Numerous cases still arise where an issue about Federal jurisdiction will depend on whether the land was acquired before or after the 1940 statute requiring affirmative assent to jurisdiction. If the land was acquired before 1940, legislative jurisdiction that presumptively passed at the time of acquisition remains vested in the United States despite the lack of affirmative assent. In Markham v. United States,[260] the defendant was charged with a murder committed after 1940 on property acquired by the United States in 1919. Although the State ceded jurisdiction, it was never expressly accepted.

Because the Army post concerned, located in Norfolk, Virginia, had been acquired before 1940, legislative jurisdiction presumptively passed. Consequently, the Federal murder conviction, dependent on legislative jurisdiction, was affirmed.[261]

In Humble Pipe Line Company v. Waggoner[262] the Supreme Court considered whether Louisiana could tax oil drilling equipment and pipe lines owned by a private company on Barksdale Air Force Base. The State passed title to the reservation in 1930. The authority of the State to levy the tax depended on whether the United States had accepted jurisdiction. There was no express acceptance of jurisdiction:

> . . . Louisiana further contends that this record shows that the Government did not intend to accept exclusive jurisdiction here. It is the established rule that a grant of jurisdiction by a State to the Federal Government need not be accepted and that a

> refusal to accept may be proved by evidence. . . . The State's contention is based chiefly on a statement that Barksdale Air Force Base buys public utility services from the State or a State instrumentality at its gate and pays to the State's school system a per capita charge for each child of a serviceman attending the State's schools. We think these circumstances wholly fail to show a rejection by the Government of the State's cession of exclusive jurisdiction over the base.[263]

Can a legal "no-man's land" be created where a State relinquishes jurisdiction and the United States does not accept it? In People v. Sullivan,[264] State jurisdiction over a theft at the NORAD (North American Air Defense Command) headquarters turned on jurisdiction over a site acquired by condemnation in 1959 as to which no acceptance of jurisdiction had been filed. There was a 1907 State statute ceding

exclusive jurisdiction to the United States over any condemned land. The defendants contended that operation of the 1907 statute divested the State of jurisdiction over the area when it was condemned. The Colorado Supreme Court held that the statute was merely a tender of jurisdiction to the United States:

> [Defendants] . . . contend that the real issue is whether Colorado has lost criminal jurisdiction over NORAD, and not whether the United States has acquired such jurisdiction. They argue that the fact, if it be a fact, that the United States does not have criminal jurisdiction over NORAD, has absolutely no bearing on the ultimate issue of whether Colorado has by statute lost its jurisdiction over NORAD. It is hopefully suggested that neither the United States nor Colorado has jurisdiction to prosecute one who commits an

alleged criminal act on NORAD. The incongruity of this result should not, they say, deter us from so holding. In their opinion, if this be a "gap" which creates a "no-man's land" within our state, the answer thereto is corrective legislation, not judicial construction. In their general analysis of the situation defendants are quite mistaken, as the question of whether the United States has gained exclusive jurisdiction over NORAD is by its very nature inextricably intertwined with the very related issue as to whether Colorado has lost all jurisdiction there over.

Colorado being a sovereign State cannot abandon its sovereignty over land situated within its four corners. . . . But . . . until the United States accepts this tender of sovereignty the State of Colorado retains its jurisdiction to the end that it may enforce its criminal laws within the geographical confines

of NORAD. In other words, the fact that there is an outstanding tender of jurisdiction does not divest Colorado of jurisdiction, as Colorado retains jurisdiction unless and until this tender is accepted.[265]

e. Inconsistency between State consent and cession statutes. A problem arises when a State simultaneously or sequentially enacts consent and cession statutes, one of which contains a reservation or condition that the other does not have. This is, or has been at some time, the situation in a number of States. Typically, unqualified consent laws passed between 1841 and 1885[266] transferred exclusive jurisdiction to the United States. Cession statutes, normally enacted after the 1885 decision in Fort Leavenworth Railroad v. Lowe,[267] often do not repeal the earlier consent laws and yet contain conditions or substantial reservations of legislative authority. In many

cases, both statutes have been recodified, often as complementing sections.

The enactment of jurisdictional statutes which conflict raises the question whether a reservation or condition in the more recent statute qualifies the earlier statute. The language of the later statute may impliedly amend the earlier. Even where the language is unclear, it may suit the interests of the United States to argue that the statute last in time must have been intended to supersede the earlier statute where a conflict appears. There is some authority that the United States may disregard the earlier statute and rely on a later dissimilar statute. In Paul v. United States,[268] California enacted both an unqualified "consent" statute and a subsequent law ceding exclusive jurisdiction over lands acquired for military purposes on condition that a description of the property and a map or plat first be filed in the proper office of record. These statutes were subsequently codified in

complementing sections in a State code. The United States acquired land for military purposes in the 1940's and purported to make an express acceptance of exclusive jurisdiction, although no descriptions, maps, or plats were filed. The Supreme Court held that the United States acquired exclusive jurisdiction, suggesting that the United States could benefit under the earlier statute.

The converse situation was presented in United States v. Lovely[269] where an 1871 State statute ceded jurisdiction over military property on condition that title be recorded and a later statute consented to the purchase of such lands without the stated condition. The property in question was acquired in 1941 and Federal jurisdiction was expressly accepted, although title to the property was not recorded. The court held that jurisdiction was nonetheless acquired, because the later consent statute impliedly repealed the earlier cession law:

. . . It is a universally accepted rule of statutory construction that where a later act purports to cover the whole subject covered by an earlier act, embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act but also to cover the whole subject involved and to prescribe the only rules with respect thereto, the later act operates as a repeal of the earlier act even though it makes no reference to the earlier act. . . . We are convinced that by enacting in 1908 the statutes comprising article 1. . . . The Legislature of South Carolina intended to and did completely cover the subject of cession and vesting of federal jurisdiction over land within the state, previously covered by the statutes comprising article 4 . . . which had been in effect since 1871, and that the Legislature's intention in so doing was to substitute the

former for the latter, thereby effectively repealing by implication the statute upon which Lovely so heavily relies. The superseding statute does not require the recordation of the evidence of title. . . .[270]

2-7. Loss of legislative jurisdiction

a. Right of State to recapture jurisdiction. A State cannot unilaterally recapture jurisdiction that has previously been transferred to the Federal Government.[271] The terms of State consent or cession legislation and any Federal acceptance of jurisdiction[272] may provide for termination of jurisdiction. Any subsequent changes in State consent or cession statutes purporting to recover additional legislative authority are ineffectual. For example, in Kingwood Oil Company v. Henderson County Board of Supervisors,[273] the United States

acquired property for a military reservation in 1942 and expressly accepted exclusive jurisdiction. A State statute consented to the acquisition without qualification. A subsequent State law, providing that a conveyance of lands to private owners would constitute a retrocession of jurisdiction, was invalid. Consequently, the State was stopped from taxing activities on land whose mineral rights were leased to private persons by the Secretary of the Interior.[274] Just as the Federal Government may acquire additional Federal jurisdiction over an area only by a new consent or cession by the State, the State may recover jurisdiction only by Federal agreement or by Federal acts or omissions evincing a loss of jurisdiction. The extent to which the United States possesses Federal jurisdiction is a Federal question to be decided by Federal courts.[275]

b. Right of United States to surrender jurisdiction. The Constitution provides for the acquisition of Federal jurisdiction, but is silent

as to the surrender of this authority.[276] In 1871, one of the early statutes retroceding jurisdiction to Ohio was ruled effective by the Ohio Supreme Court.[277] The right of the United States to surrender its legislative jurisdiction is now firmly established.

c. Methods of relinquishing Federal jurisdiction. Federal jurisdiction may be surrendered by cession by the Federal Government to the State, by an unrestricted disposition of the property to private hands, or by reversion upon noncompliance with a reverter provision in State consent or cession statute.

(1) Cession by the United States. This method is sometimes referred to as "retrocession" or "recession" and logically follows from Fort Leavenworth Railroad v. Lowe[278] based on the reasoning that that which can be unilaterally ceded to the United States can be ceded back to the State.

Congress must authorize retrocession. Although it is not clear whether the head of an agency can retrocede jurisdiction based on general authority over agency property,[279] the service secretaries have statutory power to make retrocessions:

> Not withstanding any other provision of the law, the Secretary [of a military department] may, whenever he considers it desirable, relinquish to a State or to a Commonwealth Territory or Possession . . . all of part of the legislative jurisdiction of the United States over the lands or interests under his control in that State . . . Relinquishment of legislative jurisdiction under this section may be accomplished, (1) by filing with the Governor . . . Chief Executive Officer . . . of the State . . . concerned a notice of relinquishment to take effect upon acceptance thereof, or (2) as the laws of the State . . . may otherwise provide.[280]

There are other statutes authorizing retrocession of jurisdiction over all or part of specific installations.[281]

Jurisdiction is most often retroceded when the land itself is conveyed to the State.[282] Congress in 1962 provided for the grant of easements to State agencies together with jurisdiction.[283] Use of this statute can remedy enforcement problems on State roads on bases over which States have no legislative authority.

(2) Unrestricted transfer to private hands. In Fort Leavenworth Railroad v. Lowe,[284] the Supreme Court upheld the validity of a cession of jurisdiction by Kansas to the United States but considered it terminable:

> . . . [The jurisdiction] is necessarily temporary, to be exercised only so long as the places continue to be used for the public

> purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State.[285]

Seven years later, in Benson v. United States,[286] a criminal defendant argued that jurisdiction passed to the United States only over portions of a military reservation actually used for military purposes, and that there was no jurisdiction over a homicide committed on a part of the reservation used for farming. The Court rejected this argument, narrowing its earlier holding:

> . . . But in matters of that kind the courts follow the action of the political department of the Government. The entire tract has been legally reserved for military purposes. . . . The character and purposes of this occupation having been officially and legally established by that branch of the Government which has

> control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put.[287]

Subsequent decisions have been consistent with Benson. In Arlington Hotel Company v. Fant,[288] leasing a portion of Federal park land to a private hotel operator did not terminate jurisdiction. In United States v. Unzeuta,[289] jurisdiction was not lost over a railroad right-of-way across a military reservation. Finally, in Humble Pipeline Co. v. Waggoner,[290] a mineral lease did not terminate Federal jurisdiction over the parts of Barksdale Air Force base used by Humble.

The result differs, however, when all Federal interest in land terminates. In S.R.A., Inc. v. Minnesota,[291] the United States acquired exclusive jurisdiction over a building that was later sold to

a private party under an installment-sales contract. The State assessed a real property tax on the purchaser, "subject to fee title remaining in the United States." The Court held that legislative jurisdiction terminated when the purchaser obtained equitable title to the property:

> . . . In this instance there were no specific words in the contract with petitioner which were intended to retain sovereignty in the United States. There was no express retrocession by Congress to Minnesota, such as sometimes occurs. There was no requirement in the act of cession for return of sovereignty to the State when the ceded territory was no longer used for federal purposes. In the absence of some such provisions, a transfer of property held by the United States under State cessions pursuant to Article I, ✍8, Clause 17, of the Constitution would leave numerous

isolated islands of federal jurisdiction, unless the unrestricted transfer of the property to private hands is thought without more to revest sovereignty in the States. As the purpose of Clause 17 was to give control over the sites of Governmental operations to the United States, when such control was deemed essential for federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property. We shall treat this case as though the Government's unrestricted transfer of property to non-federal hands is a relinquishment of the exclusive legislative power. Recognition has been given to this result as a rule of necessity. . . . Under these assumptions the existence of territorial jurisdiction in Minnesota so as to permit State taxation

depends upon whether there was a transfer of the property by the contract of sales.[292]

The almost unrestricted transfer of the land in S.R.A. affected legislative jurisdiction although the disposition of jurisdiction was never apparently considered by the parties. The key to the case is that legislative jurisdiction ended when the entire property ceased to be used for the Federal purpose for which it was originally acquired. The result in Humble Pipeline Co. v. Waggoner, discussed above, reinforces that conclusion. Ownership of the land is relevant only as one of several indicia of residual Federal interest. Thus, when a State cedes jurisdiction over a tract of land that contains privately owned property that remains in private hands,[293] Federal jurisdiction can be exercised over that land based on Humble Pipeline Co. so long as the larger tract remains committed generally to Federal use.

(3) Reversion under State law. Many State consent and cession laws provide that Federal jurisdiction acquired under their provisions will continue only so long as the property is used for specified purposes. In Crook, Horner & Co. v. Old Point Comfort Hotel Company,[294] the court held that jurisdiction terminated over land used for a hotel based on the Virginia statute that ceded jurisdiction provided that it would revert in the event the land were used for any purpose other than fortifications for national defense. According to the court, this was the first cession statute considered by the courts that contained such a reverter.

In Palmer v. Barrett,[295] New York ceded exclusive jurisdiction over the Brooklyn Navy Yard on the condition that it be used for a navy yard and hospital. A subsequent lease of part of the land to Brooklyn for use by market wagons was terminable by the United States on 30 days' notice and provided

that New York City would patrol the premises, that no permanent buildings would be erected on the area, and that during the period of the lease the water tax for water consumed by the Navy Yard would be reduced to that charged manufacturing establishments in Brooklyn. The plaintiff sued in State court for damages for his alleged unlawful ouster by Brooklyn from two market stands. One city defense was that the State court had no jurisdiction because the market wagons were on an area of exclusive Federal jurisdiction. The Supreme Court held that legislative jurisdiction reverted under the terms of the cession statute--at least for the term of the lease:

> . . . In the absence of any proof to the contrary, it is to be considered that the lease was valid, and that both parties to it received the benefits stipulated in the contract. This being true, the case then presents the very contingency contemplated by the act of cession,

> that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the Governmental purposes of the United States therein specified. Assuming, without deciding, that, if the cession of jurisdiction to the United States had been free from condition or limitation, the land should be treated and considered as within the sole jurisdiction of the United States, it is clear that under the circumstances here existing, in view of the reservation made by the State of New York in the act ceding jurisdiction, the exclusive authority of the United States over the land covered by the lease was <u>at least suspended</u> whilst the lease remained in <u>force</u>.[296]

The phrase "at least suspended" suggests that jurisdiction once lost might be regained when the <u>status quo ante</u> resumes. This would be a unique

view of legislative jurisdiction and would be at odds with the reverter statute construed in the case. The more typical result where some act or omission terminates jurisdiction is that jurisdiction once lost is lost forever in the absence of a new cession of jurisdiction.

Today, if only part of a military installation were leased, Humble Pipeline Co. v. Waggoner[297] would suggest that Federal jurisdiction would not terminate. A different result might follow depending upon the phrasing of a reverter statute. If, under a reverter statute, jurisdiction is lost, then the question will arise whether it is regained at the end of the lease. If it is not, a significant problem may arise where records of prior jurisdiction terminating leases are misplaced or destroyed. Leasing operations are largely decentralized in the Army, and representatives of the Chief of Engineers execute most leases.[298] Moreover, leases are generally only for 5-year

periods.[299] Consequently, when a problem arises years later about a piece of land, it may be difficult to determine if the property has ever been leased. Where a reverter statute affects formerly leased land, it is conceivable that the United States might lose jurisdiction and never know it.

A number of State consent and cession statutes describe the purpose for which land must be used but do not expressly provide for reversion in case the land is used for another purpose. Whether a right of reversion should be implied is not clear. Where, for example, jurisdiction is ceded to the United States "to be exercised so long as the same shall remain the property of the United States," the Supreme Court has held no reversion takes place when the United States enters into a long-term lease with a third party,[300] or grants a right-of-way across the property.[301]

d. Acceptance of jurisdiction by the State. There is some uncertainty whether legislative

jurisdiction can be returned to a State without its acceptance or consent.

Some courts suggest that where the United States purports to cede its jurisdiction to a State, acceptance by the State is unnecessary.[302] These may merely mean that acceptance by the State is presumed. This would be consistent with the Federal acceptance principle prevailing before 1940. Another view is that a State is powerless to reject jurisdiction ceded to it on the theory that States have residual political jurisdiction and the Federal Government only possesses such powers as are delegated to it or reserved by it. The counterargument that some acquiescence, acceptance, or consent by the State may be required finds some support in Fort Leavenworth Railroad v. Lowe,[303] in which the Court spoke in terms of ". . . the State and general Government [dealing] with each other in any way they may deem best to carry out the purposes of the Constitution. . . ."[304]

If the assent of the State in some form is necessary, a problem occurs when the United States purports to surrender jurisdiction and the State rejects it. There are no reported decisions bearing directly on this issue. Nevertheless, most Federal statutes authorizing the retrocession of jurisdiction typically contain a provision that provides "this grant must be accepted by the State in such manner as its laws provide."[305]

Where Federal jurisdiction terminates by means of an unrestricted disposal of the property to private hands or by operation of a reversion provision in a State consent or cession statute, State acceptance is occasionally evidenced by State action related to the property. Hence, in S.R.A., Inc. v. Minnesota,[306] the Supreme Court, in holding that disposal of title to property caused a surrender of Federal jurisdiction to the State, remarked that ". . . If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of

a tax on the property."[307] Where jurisdiction returns to the State via a reverter clause, acceptance may be presumptive since the return of jurisdiction obviously was anticipated when the clause was written.

e. Effect of Federal law permitting States to legislate. Congress has enacted various statutes permitting States to exercise substantial legislative authority over lands under exclusive Federal jurisdiction. These statutes raise the question whether they constitute a return of legislative jurisdiction. In Arapajolus v. McMenamin,[308] the Supreme Court of California held that residents on a military reservation were entitled to vote in State elections on the ground that Congress had relinquished jurisdiction over those lands by Federal enactments of the type described in paragraph 2.12 below:

. . . Congress may recede or return to the States any jurisdiction over such properties which is not inconsistent with such Governmental use. . . . In like fashion the Congress has receded and returned to the States jurisdiction over federal lands within their borders to enforce State unemployment insurance act . . . to tax motor fuel sold therein . . . to levy and collect State income taxes. . . . It is clear that Congress has receded to the States jurisdiction in substantial particulars over federal lands over which the United States previously had exclusive jurisdiction. It may no longer be said of those lands that they are . . . "as foreign to . . . (California) as is the State of Indiana or Kentucky, or the District of Columbia." . . . It is our conclusion that since the State of California now has jurisdiction over the area in question in the substantial particulars above noted,

> residence in such areas is residence within the State of California entitling such residents to the right to vote given by sec. 1, Art. II of our Constitution.[309]

Similar reasoning supported the Supreme Court voting decision in Evans v. Cornman.[310] Because persons on a Federal enclave in Maryland are subject to State criminal law (under the Federal Assimilative Crimes Act), State income, gasoline, sales and use taxes, State unemployment and workmen's compensation laws, vehicle registration and licensing laws, process and jurisdiction of State courts, and can use State courts and State public schools, the Court concluded that such persons are "treated by the State of Maryland as State residents to such an extent that it is a violation of the Fourteenth Amendment for the State to deny them the right to vote."[311]

Actually, legislative jurisdiction has not been retroceded when Congress permits State law to operate on enclaves. If it is kept in mind that "jurisdiction," in context, means "authority to legislate,"[312] it is clear that the Federal Government has not surrendered its residual jurisdiction over the land areas affected. The United States retains basic legislative authority; it merely permits the States to apply their laws until that permission is withdrawn.[313] By legislating with respect to the enclave, the State concedes that the Federal land is not a foreign entity but an element of the State. The result is that State rights and benefits can be claimed for enclave residents while the Federal Government continues to exercise residual legislative authority over the areas.

f. Federal policy. Generally, the Army will not seek legislative jurisdiction and will retrocede unnecessary jurisdiction.[314] Concurrent jurisdiction may be sought where it is necessary for the Federal

Government to furnish or augment local law enforcement.[315] Exclusive jurisdiction may be sought where military operations require freedom from State and local law, or where State or local laws otherwise unduly interfere with mission.[316] This policy is based on the belief that the exercise of Federal jurisdiction has substantial disadvantages and is unnecessary. Exclusive jurisdiction makes inapplicable State civil and criminal law as such and precludes State law enforcement on the installation. Residents may be denied access to State rights and benefits. Absent legislative jurisdiction, the supremacy and property clauses of the Constitution arguably insulate Federal activities from State interference and provide independent authority to legislate to protect Federal land.

The desirability of Federal legislative jurisdiction was reviewed from 1954 to 1956 by the Attorney General's Interdepartmental Committee for

the Study of Jurisdiction Over Federal Areas within the States. The Committee concluded that Federal jurisdiction was generally undesirable and recommended legislation to permit agencies to return legislative authority to the States.[317]

Section IV
Relations Between States and Federal Installations

2-8. Introduction

Relations between military installations and the States in which they are located depend in great part on whether the installation is an enclave. An enclave is a tract of land or territory enclosed within foreign territory.[295] Areas over which the United States exercises exclusive jurisdiction, or partial jurisdiction in some instances, are considered Federal enclaves. Federal-State

relations respecting enclaves differ according to the issue involved and whether or not the enclave is viewed as part of the State in which it is located. The several principal issues in Federal-State relations are discussed here in light of those factors.

2-9. Federal-State relations affecting enclaves generally

a. Control of alcoholic beverages on military installations--insulating enclaves from State regulation. In Federal areas under exclusive jurisdiction, ". . . the national and municipal powers of Government, of every description, are united in the Government of the union. . . ."[296] The courts have stated that ". . . political authority, dominion and legislative power . . ."[297] are lodged in the United States where it possesses exclusive jurisdiction over an area, traditionally depriving

the states of legislative authority. Under this view, States have not been able to directly or indirectly apply their laws on enclaves. Thus, commerce between a place outside a State and an enclave or between a place inside the State and a Federal reservation under exclusive jurisdiction is "interstate commerce."[298]

In the 1938 case of Collins v. Yosemite Park & Curry Co,[299] the State claimed that the twenty-first amendment permitted it to apply its liquor laws to a private lessee on the park, a Federal enclave. The twenty-first amendment permits States to regulate alcoholic beverages "used therein." The Supreme Court ruled that Yosemite Park was not in California for purposes of the amendment:

> . . . As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the Twenty-First Amendment. There was no

> transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the Twenty-First Amendment is not applicable.[300]

The view that enclaves are States within States and therefore unreachable by State regulation is applied today to a narrow range of issues. It continues to apply with full force to regulation of alcoholic beverages destined for military installations.[301]

In United States v. Mississippi Tax Commission,[302] the Supreme Court again faced State tax and regulatory schemes attempting to reach liquor sales on Federal enclaves. The Court invoked the State within a State rationale of Collins:

. . . The Collins Court, in rejecting California's reliance upon the Twenty-first Amendment, pointed, to be sure, to the fact that "delivery and use" of the liquor was "in the park," 304 U.S., at 538, 82 L.Ed. 1502. But, considered in the context of the case, the Court's reference clearly was to the transaction between the out-of-State suppliers and the park concessionaire. It was that transaction which California sought to regulate, and insofar as that transaction was concerned, the delivery and use--that is, the delivery, storage and sale--of the liquor occurred exclusively within the Park. The particular transactions at issue in this case between out-of-State suppliers and the military facilities stand on no different footing, and thus, given that the State has retained only the right to serve process on the two bases, Collins is dispositive of the Commissions's

effort to invoke the State's authority under the second section of the Twenty-first Amendment to impose its markup on these transactions.

. . . For our purposes, here, it suffices to note that any legitimate State interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate the distinct transactions between the suppliers and the nonappropriated fund activities that involve only the importation of liquor into the Federal enclaves which "are as to Mississippi as the territory of one of her sister states or a foreign land," 340 F. Supp., at 906. To conclude otherwise would be to give an unintended scope to a provision designed only to augment the powers of the States to

regulate the importation of liquor destined for use, distribution, or consumption in its own territory, not to "increase its jurisdiction," Collins v. Yosemite Park & Curry Co., 304 U.S., at 538, 82 L.Ed. 1502.[303]

Mississippi Tax Commission was relied on in 1983 to defeat efforts by the State in United States v. Texas[304] to stop out-of-State liquor sellers from selling directly to Navy nonappropriated fund instrumentalities located on exclusive jurisdiction bases. The direct dealing between the Navy retailers and the out-of-State sellers violated Texas law requiring that out-of-State sales go through in-State wholesalers who were required to pay a $2 tax on each gallon sold. The Navy effort to get the cheapest price for its liquor was consistent with Department of Defense policy.[305] Because "regulation is an incident of sovereignty"[306] and because the instrumentalities were located on

exclusive jurisdiction areas, the State regulatory scheme was inapplicable to dealings between the installations and the out-of-State businesses.

Note that these decisions involved transactions that affected exclusive jurisdiction installations but did not actually touch the surrounding State. States can regulate activities within their territory. Consequently, stopping a State from regulating out-of-State liquor flowing onto exclusive jurisdiction installations "is not to say that a State may not institute measures designed to prevent the unlawful diversion of alcohol destined for a Federal enclave into the state's stream of commerce."[307] The power of the state to regulate alcohol within its borders was the issue in North Dakota v. United States.[308] In that case, North Dakota imposed certain labeling and reporting requirements for untaxed out-of-state liquor sold on Grand Forks Air Force Base and Minot Air Force Base, both concurrent jurisdiction installations. The

United States argued that the labeling and reporting requirements frustrated the Federal purpose of purchasing liquor at the lowest cost. North Dakota argued that the requirements were necessary to ensure untaxed liquor was not consumed by unauthorized persons. The Court, while recognizing Congress's power to preempt the State labeling and reporting requirements, upheld North Dakota's regulations finding that the requirements were not unduly burdensome to the Federal purpose.[309]

Where the State attempts to regulate activities on nonexclusive jurisdiction installations, Federal defenses to regulation are limited to those based on the supremacy clause of the Constitution.[310]

Whether an enclave is considered to be within the surrounding State determines other questions, many of them concerning access of installation residents to local rights and benefits. While some courts have held that enclave residents do not live within the surrounding State for these purposes, these

decisions rest on the traditional view that enclaves are States within States. Although regulation of alcoholic beverages continues to be controlled by this view of Federal-State relations, most issues involving Federal-State relations are likely to be resolved according to the notion that enclaves remain part of the surrounding State.

b. Annexation of military installations--recognition that installations are within geographical boundaries of the States. The Supreme Court departed from the traditional view that enclaves are States within States when it considered whether an enclave is within a State for purposes of annexation by a municipality. In Howard v. Commissioners of Louisville,[311] Louisville annexed an adjoining naval ordnance plant that was under exclusive Federal jurisdiction. The City then attempted to enforce a tax on earnings of employees on the installation, as it was permitted to do by the Buck Act.[312] The Court upheld the annexation

because it did not interfere in any material way with the enclave.

> . . . The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not

interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.[313]

The annexation and consequential taxation did not interfere with the Federal Government because Congress through the Buck Act already permitted State and local taxation on areas of exclusive jurisdiction. Because State taxation was not objectionable to the Federal Government there was no reason to preclude or overturn the annexation, which did not otherwise concern the enclave, especially where the plaintiffs in the case did not include the Government itself.

One motive of State subdivisions in annexing military property is to permit them to reach and annex private property on the other side of the military installation.[314] Other advantages may accrue to annexing cities. Increasing the population of the city by including the installation population will increase the city's share of State revenues generated from sources including cigarette taxes, motor vehicle licensing fees and taxes, highway users taxes, and State sales taxes. Annexation also

increases the local revenue base. Thus local sales, use, and property taxes and licensing fees may be charged persons and businesses on the installation.[315] Some of these taxes and fees may indirectly fall on the United States Government. For example, local franchise taxes charged against public utilities may be passed onto the Government consumer and will not be barred by the supremacy clause because only the economic burden falls on the Government.[316] Other taxes and fees charged contractors who do business with the installation also will be passed on to the Government. Annexation may bring some benefit to the military community, such as municipal fire protection,[317] road maintenance, purchase of utilities at municipal rates, closer and better schools, and police protection. Whether the typical city has the resources or inclination to provide these services is another question, as is the question whether the installation desires the extension of some of these services.

In light of Howard, it has become Department of Defense and Army policy not to contest annexation, although it may be opposed when not in the interests of the Government.[318] Some State annexation laws require the consent of affected landowners to the annexation.[319] Where another political subdivision opposes an annexation, the United States will not approve it.[320] Even where consent is not necessary, commands are required to apprise the DA of the pending annexation so that an Army position on the annexation can be determined.[321] Commanders receiving annexation requests will evaluate the proposal and forward it with all documents through the Chief of Engineers and The Judge Advocate General to the Assistant Secretary of the Army (Installations and Logistics), for determination of the Army position.[322]

Annexations of military installations have been challenged on a variety of grounds. Annexation of Fort Leavenworth by the city of Leavenworth was

belatedly opposed after it was discovered that Army utility charges increased because the local utility was required to pay a 3% franchise tax.[323] The opposition was rebuffed in United States v. City of Leavenworth[324] because it was filed after the 30-day time limit set by State law for the filing of objections had passed.[325] On the other hand, failure to follow State statutory procedures helped private landowners, Riley County, and Manhattan, Kansas, to block the annexation of Fort Riley in Board of County Commissioners v. City of Junction City.[326] And whereas annexation of Offutt Air Force Base was overruled in United States v. City of Bellevue[327] because its sole purpose was to increase its revenue base, a similar argument that annexation of Fort Leavenworth would be a sham because the city would benefit from annexation without providing any services to the installation was virtually rejected in United States v. City of Leavenworth.[328]

Annexation of Wright-Patterson Air Force Base by Dayton, Ohio, was overruled on other grounds in United States v. McGee.[329] Annexation was improper principally because the State legislature had passed a statute[330] (similar to one subsequently passed in Kansas in time for the Fort Riley case[331]) forbidding the annexation of military installations in the State. In addition, the court found that "potential for friction" between the base and Dayton was an "independent justification" for overruling the annexation:

> Annexation of the Wright-Patterson Air Force Base would create a real danger that a future board of city commissioners might pass ordinances that interfere with the base's essential task of national defense and create friction between city and military officials. The fact that the present board of commissioners apparently has agreed not to

interfere with the functioning of the base is not relevant to this consideration. . . .[332]

The court distinguished Howard on two grounds: first, that the suit in Howard was brought by the ordnance plant employees rather than the United States and, second, that the potential for friction is greater in the case of a "key military base" than it is with respect to a "mere ordnance plant."[333]

In light of United States v. McGee, Army attorneys should no longer limit defenses to annexation to procedural defenses permitted by State law or evidence of actual friction between the municipality annexing the installation and the installation.

Just as Collins v. Yosemite Park Co. has implications beyond the regulation of alcoholic beverages on enclaves, so too does Howard v. Commissioners of Sinking Fund of Louisville affect issues beyond annexation. As explained in paragraph

2-10, the Howard rationale--that military installations may be considered to be within the State--has been increasingly relied on either expressly or implicitly in a number of areas affecting persons on military installations and the installations themselves. Howard has been useful in bringing State services, rights, and benefits to the enclave and its population. Nevertheless, it also appears to be a limitation on the concept of exclusive legislation jurisdiction, although the scope of that limitation is neither clear nor universally accepted, as recognized in 1982 in Economic Development and Industrial Corp. of Boston v. United States:[334]

> The Howard . . . decision . . . effectively repudiated the traditional notion of extraterritoriality of federal enclaves, a notion which viewed the exclusive legislative power as "in essence complete sovereignty." S.R.A. v. Minnesota, 327 U.S. 588, 562 (1946).

> Yet the full implications of this repudiation have yet to be addressed by the appellate courts [footnote omitted] . . . . One commentator has forcefully argued that the recent cases, taken to their logical extreme, would permit the extension of State Governmental jurisdiction in its full scope over federal enclaves, subject only to displacement by federal law--a view that would redefine the "exclusive legislation" clause as conferring, not an exclusive power to legislate, but rather a power to legislate exclusively whenever appropriate.[14] Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283, 288-90, 332-36, 376-82 (1976).[335]

Footnote 14, cited in the text above, elaborated on the logical effect of Howard:

The plaintiffs contend that any approach focusing upon a potential for "friction" would read the "exclusive Legislation" clause out of the Constitution and leave Article I properties no greater independence than that afforded to any federal property under Article IV, Section 3 [the Property Clause] and the Supremacy Clause. This objection is without merit. The United States' power over Article IV property is confined to its enumerated powers and the necessary and proper clause. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976). But even under a narrow interpretation of Article I, the authority to exercise "exclusive Legislation in all Cases whatsoever" would still permit the exercise over enclaves of whatever police and other Governmental powers, otherwise reserved to the states, are deemed expedient.[336]

The most that can be said about the conflict between Collins and Howard is that Army lawyers should be alert to seize whichever rationale best suits the interests of the United States in a particular situation, keeping in mind the effect of that choice on subsequent issues affecting the same installation.[337]

2-10. State rights and benefits and their applicability to installation populations

a. Voting. Prior to 1970, most courts that had considered the voting question ruled that persons living on enclaves did not satisfy voting residence requirements.[338] In 1970, however, the Supreme Court held in Evans v. Cornman,[339] that Maryland denied equal protection of the laws to persons living on the grounds of the National Institutes of Health, a Federal enclave in Bethesda, by denying them the

right to vote. The Court refuted the State argument that the enclave was not a part of the State:

> . . . Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as State residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that "fiction of a State within a state" was specifically rejected by this Court in Howard v. Commissioners of Louisville, 344 U.S. 624, 627 (1953), and it cannot be resurrected here to deny appellees to right to vote.[340]

Noting that a classification which works a deprivation of voting rights must be supported by a compelling State interest, the Court conceded that a

State does have a compelling interest in ensuring "that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them."[341] Nevertheless, the Court concluded that the enclave residents had such an interest in view of the applicability to them of State criminal law through the Assimilative Crimes Act (incorporating certain State criminal laws into the Federal law applicable on the enclave),[342] State taxing laws through the Buck Act (permitting collection of certain State taxes on Federal enclave),[343] State unemployment laws[344] and workmen's compensation laws,[345] State automobile licensing and registration laws, amenability to State process, access to Maryland courts in divorce and child adoption proceedings, and the enrollment of the children in Maryland public schools. Thus, the Court agreed with the conclusion of the district court that "on balance the [appellees] are treated by the State of Maryland as State residents to such

an extent that it is a violation of the fourteenth amendment for the State to deny them the right to vote."[346]

Although States and localities still may be encountered that will deny installation residents rights and benefits, including voting rights, based on the State-within-a-State view and pragmatic concerns, Evans and Howard together provide strong arguments for the extension to enclave residents of civil rights normally granted to State citizens.

b. Holding office. Even before Evans v. Cornman, the Supreme Court of West Virginia upheld the right of a resident of a Federal enclave to run for local office in Adams v. Londeree.[347] Londeree, the candidate for mayor in a local municipality, was neither a serviceman nor Government employee, but resided in quarters leased for private occupancy on a Navy installation under exclusive Federal jurisdiction. The State constitution provided that only qualified voters could become officeholders

and, further, that, in order to vote, a person must have been a "resident of the State for one year." A petition for mandamus, filed to require the ballot commissioners to strike the candidate's name from the ballot on the ground that Londeree was not a resident of the State, was unsuccessful:

> [T]he State, in ceding the territory within the South Charleston Naval Reservation, retained sovereignty over the same to the extent that such State sovereignty does not conflict or interfere with the "power" of the Federal Government "to exercise exclusive jurisdiction" as to the uses and purposes for which the land was acquired, and that such uses and purposes have no relation to the right or privilege of persons residing thereon, with the consent of the United States, to vote in State elections. In so far as this record shows, the Federal Government has never accepted, claimed or

attempted to exercise, any jurisdiction as to the right of any resident of the reservation to vote.

[T]he United States has, we think, long since refused to accept sole sovereignty of such ceded lands and has repeatedly, both through its Courts and by Act of Congress, recognized and insisted that States have retained sovereignty as to such matters as do not interfere or conflict with the use of the areas by the United States for the purpose or purposes for which the same were ceded. By so holding, the necessity of disfranchising a large number of citizens is avoided. . . .[348]

c. Relief benefits for the poor. In 1841, the Supreme Judicial Court of Massachusetts held that residence on an enclave was not local residency which would qualify the residents or their children for local welfare payment.[349] A contrary result was

reached by the Supreme Court of Colorado in the more recent case of County of Arapahoe v. Donoho.[350] The statute in question provided for payment of relief benefits to residents "in the county." The County Welfare Board denied the claim of Mrs. Donoho who lived on a military installation under exclusive Federal jurisdiction. She successfully sued. The court noted that relief benefits were paid for in part by Federal funds and concluded:

> Therefore, in view of the fact that "exclusive legislative" jurisdiction does not operate as an absolute prohibition against State laws but has for its purpose protection of federal sovereignty, we conclude that it does not operate to prohibit the payment of relief to a resident of Fort Logan. The conferring of a benefit required by federal law cannot be construed as an act which undermines the federal sovereignty. Indeed by paying relief

in these circumstances the federal policy to recognize citizens of the United States is fostered and promoted. . . .

We see no clear conflict between the terms of the State law and the exercise of necessary functions in carrying out the program, in the light of the geographical location of Fort Logan. Perhaps the most persuasive factor in evaluating the contention of possible federal interference is the federal statute, 42 U.S.C.A. ✍1352(b), supra. It is illogical to suppose that the federal government would interfere with the county carrying out a program contemplated by federal statute.

In the light of all the foregoing, it is amply clear that the trial court was correct in ruling that the claimant satisfied statutory

requirements of residence within Arapahoe County. . . .[351]

d. Protection of spouse and child abuse victims. The Department of Defense encourages programs "that contribute to a healthy family life" among military families.[352] Child and spouse abuse and neglect are matters of concern to the military.[353] Army regulations provide for comprehensive family advocacy and child care programs at military installations.[354] Those programs must take account of locally available child and spouse welfare services. Army policy requires every soldier, employee, and member of the military community to report information about known and suspected cases of child abuse to appropriate authorities.[355] Besides notification, installation child welfare programs may need local agencies to remove a child from a military home since there is no express authority in

Federal law that permits removal or placement in a temporary home.

Local agencies may decline to assist installations because of the fear that their employees may be subjected to personal liability for their actions, a concern that the Army cannot easily alleviate.[356] In other instances, agencies may decline assistance because they see exclusive jurisdiction as a bar. Even where local agencies provide support, military parents may challenge their actions in an effort to retain or reclaim custody.

In In Re Terry Y,[357] the parents of a Fort Ord child appealed a juvenile court order taking their son from them after suffering four fractures over a two-year period. The court defined a Federal policy in favor of reliance on local child welfare authorities to make foster care placements from the child advocacy regulation then in existence[358] and from social security statutes that authorize grants

to States for child welfare services[359] available to "all children in need thereof."[360] Relying on this expression of Federal policy and Howard v. Commissioners of Louisville and Evans v. Cornman, the court rejected the parents' argument that the local juvenile court lacked jurisdiction over the on-post problem:

> Unless Monterey County acts to protect the children at Fort Ord, these children may be left without Governmental protection. . . . As federal enclaves such as Fort Ord remain geographically and legally part of the State in which they are located . . . it follows that Congress contemplated that the State would make its services available to the children on federal enclaves. The Monterey County Juvenile Court's exercise of its statutory jurisdiction to protect Terry promoted the federal policy toward abused children as reflected in the

> applicable Army Regulations and the Social Security Act. The Court's exercise of its jurisdiction, invited by the federal authorities in command at Fort Ord, in no way conflicted with the federal sovereignty but was an integrated part of the army's efforts to alleviate the problems of child welfare on the base. . . .[361]

Similar results have obtained in other cases dealing with the extension of child welfare laws,[362] and juvenile delinquency laws,[363] and spousal protection laws[364] on military installations. Although the court's finding in In Re Terry Y. that Federal policy favors reliance on local agencies may be suspect[365] and additional issues may be raised by its implicit conclusion that jurisdiction can be partially retroceded by an installation commander without recourse to congressional action or compliance with existing statutory procedures for

retrocession, the rationale of the case provides an efficient argument to use when seeking local agencies' help. Moreover, the social security statutes cited may provide a strong argument to compel local cooperation.

e. Education. In 1841, the Supreme Judicial Court of Massachusetts not only rejected the availability of public relief for enclave residents but also held:

> . . . We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State, than [service of process], are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated.[366]

This principle was the keystone for most subsequent decisions concerning access to local schools.[367] Some courts, finding that legislative jurisdiction over Federally owned areas remained in the State, upheld access to State schools on an equal basis with State children.[368] Other courts, finding exclusive jurisdiction vested in the United States, denied access on the ground that the affected areas are not within the State or school district.[369] Some States enacted legislation providing for the education of children residing on military reservations.[370]

Blocking access to local education is less a function of legal concern than it is a function of local budgets. Since 1950, when Congress first authorized the payment of "impact aid" for school districts in which there is a significant Federal presence,[371] there have been few attempts to keep military children out of local schools. Substantial cuts in impact aid[372] have, however, resulted in efforts to charge tuition to parents of military

children attending local schools. No distinction has been made between residents of exclusive jurisdiction installations and nonexclusive jurisdiction installations in statutes authorizing tuition charges. In one case, only on-post children were the target of tuition charges, presumably for the reason that the parents did not pay local taxes to support local schools.[373] In another case, all nondomiciliary children were affected, regardless of residence.[374]

The United States was successful in 1984, defeating the latter tuition scheme in United States v. Onslow County Board of Education.[375] The court found that the school board breached a contractual commitment flowing from the receipt of school construction aid over several years to educate Federal children.[376] Moreover, the court, concluding that the State tuition scheme was a tax, held it was also preempted by the Federal policy of the Soldiers' and Sailors' Civil Relief Act that service

members should not be subject to taxation except in their home States, and that, in any event, the tax, which burdened the relationship between service members and the Government, was in essence an unconsented tax on the United States itself.[377]

Army lawyers should be alert to attempts by local school boards to charge tuition or deny access to educational facilities to children on or off the installation.

f. Miscellaneous State rights. There are numerous miscellaneous rights and privileges, other than those discussed, which are usually reserved under State law for residents and which arguably extend to enclave residents based on Evans v. Cornman. Among these are the admission to practice law, medicine, and other professions; the privilege of employment by State or local Governments; receiving higher education at State institutions free or at a favorable tuition; acquiring hunting and fishing licenses at lower cost; obtaining

visiting nurse service or care at public hospitals, orphanages, asylums, or other institutions; serving on juries; and acting as an executor of a will or administrator of an estate. Different legal rules may also apply with respect to attachment of property of nonresidents.[378] There is scant litigation involving such miscellaneous matters, however, and it is probable that most of these issues are resolved by State administrative agencies.

2-11. Access to courts, service of civil and criminal process, and jury service by soldiers

a. Access to courts generally. Of significant concern to enclave residents and visitors is the question of what judicial forums are available to resolve legal issues arising on enclaves or involving enclave residents and what law will be applied in the forum finally selected. There are

several candidate forums for most enclave-connected civil cases: the courts of the State in which the enclave is located, the courts of some other State, or Federal court.

The law in most States categorizes claims as transitory or local.[379] Transitory claims, typically sounding in tort and contract, can be brought anywhere personal jurisdiction can be obtained over the parties. Thus, a litigant in an enclave-connected case involving a transitory claim can go to local State court or the courts of any other State that would consider the claim transitory so long as the litigant can serve the opposing party. Where a transitory claim arises on an enclave and suit is brought in local State court, the problem will arise of how to determine the applicable substantive law. Applying its conflict-of-laws rules, State courts exercising jurisdiction over a transitory claim will apply to the case the substantive law of the forum, the place where the

claim arose (the enclave), or some other place relevant to the claim and the parties. Where conflict rules result in application of the law of the enclave, the court will have to determine what that law is: the law of the State in which the enclave is located or some law peculiar to the enclave. The law applicable to Federal enclaves is discussed in paragraph 2-12 below. An additional problem is whether a State plaintiff can obtain personal jurisdiction over an enclave resident by service of process on the enclave. This issue is discussed below in paragraph 2-11b.

Local claims can be brought only in a limited number of forums. Some local actions are domiciliary, which is to say that they are dependent upon the domicile of one or both parties. Depending upon the applicable State law, for example, a divorce action may be brought where the parties lived as man and wife for some period of time or where one of the two parties is currently domiciled

or resident. Many enclave residents will not meet jurisdictional requirements predicated on domicile, or permanent residency since most are temporary residents on Federal property and maintain permanent residency elsewhere. But others may claim the enclave State (the State in which the enclave is located) as domicile based on residence on the exclusive Federal jurisdiction area.[380] Other examples of local actions affecting enclave residents are those involving adoption, commitment, child custody, and probate.

Common to all local actions is that more is required than simply obtaining personal jurisdiction over the parties. The subject matter of the claim must be physically located in the forum or more than mere presence of one of the parties in the forum must be shown. The salient issue arising with respect to enclave-connected local actions is whether a local court will consider the enclave to be within the State so that the court can decide the

controversy and, for example, take a child from its home or grant a divorce.

In Lowe v. Lowe,[381] the Maryland Court of Appeals held that residents of an exclusive jurisdiction area who would have otherwise met State residency requirements were not residents of the State and could not file for divorce.[382] In a separate concurring opinion, two members of the court observed:

> I do not see any escape from the conclusion that ownership of their personal property, left at death, cannot legally be transmitted to their legatees or next of kin, or to any one at all; that their children cannot have legal guardians of their property; that they cannot adopt children on the reservations; that if any of them should become insane, they could not have the protection of statutory provisions for the care of the insane--and so on, through the

list of personal privileges, rights, and obligations, the remedies for which are provided for residents of the state.[383]

There are other cases holding that enclave residence satisfies State jurisdictional requirements.[384] In Lowe, for example, the court noted a widespread practice of lower courts in Maryland to assume jurisdiction over probate and administration matters involving such residents. A number of States have enacted statutes providing that residence on military installations creates a presumption of State residency either generally or specifically for actions involving divorce.[385] Various Federal agencies also have been given statutory authority to dispose of the personal assets of patients and members of their establishments.[386]

When State courts declare that an enclave resident is a State resident for purposes of bringing suit, the State really is exercising civil

jurisdiction over persons on the enclave, albeit with their consent. The early cases, however, hold that State venue and jurisdiction do not extend on the enclave.[387] In some instances, such as juvenile delinquency and child welfare, discussed above in section 2-10, this exercise of State jurisdiction is a benefit for the Federal Government and enclave residents. Although generally advantageous and consistent with the rationale in Howard v. Commissioners of Louisville, extension of jurisdiction in these cases erodes the notion that a State cannot exercise jurisdiction on the installation unless it reserved the right to do so when jurisdiction was first ceded.

Without conceding that State courts can exercise jurisdiction on a military installation, absent a reservation of jurisdiction, the Army has attempted to conform its actions to State judicial action when consistent with military interests. In one case, for example, a local State court committed a

nonconsenting psychotic dependent to an Army hospital on a military reservation under exclusive Federal jurisdiction. The Judge Advocate General expressed the view that, while such a commitment order imposes no duty on Army authorities, it does confer upon them the privilege of interfering with the patient's personal freedom. It was pointed out that if, after admission, the patient is found to be nonpsychotic and not dangerous to oneself or others, further involuntary detention is unauthorized, despite the terms of the commitment order.[388]

Any State judicial order, whether a valid exercise of jurisdiction or not, remains subject to Federal supremacy. For instance, where a State court in a divorce action had personal jurisdiction over the parties and ordered the respondent-soldier not to visit the assigned quarters on a military post under exclusive jurisdiction, The Judge Advocate General concluded:

> . . . It is the opinion of this office that a state court having in personam jurisdiction has the power to require a defendant serviceman to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might require to be done or omitted within the limits of such territory. It is the further opinion of this office, however, that a contrary result would follow if the court's order would prevent accomplishment of an assigned duty or materially interfere with a Federal function . . . .[389]

An alternative forum is Federal court. Access to the Federal forum is contingent on showing that the parties are diverse and that the claim exceeds $10,000 in value[390] or that the claim arises under the Constitution or Federal law.[391]

To obtain diversity jurisdiction, the parties must be citizens of different States. Residence on

an enclave will not defeat diversity in an action between an enclave resident who is a domiciliary of another State and a resident of the State in which the enclave is located because citizenship and not temporary residence controls.[392] If an enclave resident decides to claim a domicile in the enclave State based on residence on the enclave, whether to defeat diversity in an action with an enclave State resident or obtain diversity in an action with a party from one's old State, a possible objection may be that a new State domicile cannot be acquired because the enclave is not within the State. Even if diversity and the amount in controversy are shown, Federal courts deny jurisdiction in a variety of matters, such as domestic relations of husband and wife or parent and child[393] and matters strictly probate or administrative in nature.[394]

In Federal question jurisdiction, the focus is on the subject matter of the case rather than the parties. Most private disputes have nothing to do

with Federal statutory law. Nevertheless, as explained below in section 2-12, there is a body of formerly State law that applies on enclaves as Federal law that constitutes the law of the United States and may provide Federal question jurisdiction.

A significant problem arises in connection with matters such as domestic relations over which Federal courts generally deny jurisdiction and over which State courts refuse to take jurisdiction because the claim arises on an enclave that the court believes to be outside its jurisdiction. The rationale for Federal abstention in these areas is noninterference with the strong State interest in domestic relations, the competence of State courts in settling family disputes, the possibility of incompatible Federal and State court decrees in cases where there is continuing supervision by State courts, and congested Federal dockets.[395] Where a State court declines jurisdiction because the

Federal Government exercises exclusive jurisdiction over an area, these considerations dissipate. Hence, although there is no precedent to support or undermine this position, there is some basis for arguing that even in these areas there should be Federal jurisdiction.

b. Service of State civil and criminal process. Virtually all State consent or cession laws transferring exclusive or partial jurisdiction to the United States reserve a right for State authorities to serve civil and criminal process on the area covered. Such a reservation is not inconsistent with Federal exercise of exclusive jurisdiction in the same sense that a State does not cede its sovereignty to another State whose process is served within the State.[396] Where the United States has only concurrent jurisdiction or a proprietorial interest, State authorities can serve process incident to residual State authority and a reservation of the right is unnecessary.[397] Service

of State process in exclusive and partial jurisdiction areas is invalid, however, unless the right to do so has been reserved by the State or Congress has enacted enabling legislation as it has done in some instances.[398]

Where a State has reserved or been granted the right to serve process within an enclave or has a residual right to do so in an area of concurrent or proprietary jurisdiction, its authorities can enter to serve process subject to reasonable controls designed to prevent interference with Federal functions:

> Civil officials authorized by applicable State law will be permitted, upon proper application, to enter areas subject to the right to serve process for the purpose of levy on and subsequent sale of personal property of personnel residing thereon, subject to reasonable limitations. This authority does

> not extend, however, to levy on or sale of personal property of military or civilian personnel essential to or proper for the performance of their official duties.[399]

Even though a State has reserved the right to serve "process,"[400] judge advocates should question whether all the legal documents served on an installation constitute "process," which is a question dependent on State law.[401] In this regard, judge advocates must decide whether and how to establish installation procedures to review process to be served on the installation. Where process appears to be regular on its face, service may be allowed, leaving the recipient to challenge any defect in court. On the other hand, installations may wish to examine process and disallow service, either where the process is irregular or where the State's reservation does not permit service in the reviewer's mind.[402]

Generally, reservation to serve process within an exclusive or partial Federal jurisdiction area applies only to process arising from offenses, incidents, or activities taking place within the surrounding State area.[403] Consequently, even where there has been a reservation of the right to serve process, service can be disallowed where the process relates to an incident that occurred on the installation. The logical premise underlying the general rule is that the reservation of the right to serve process should not enlarge the jurisdiction the State would have absent the reservation. This premise leads to one possible exception to the general rule.

It is not clear, for example, whether the State can be stopped from serving process related to a transitory claim arising on the installation. Transitory actions are customarily within the subject matter jurisdiction of State courts. Assume that a transitory claim arises on an enclave, the

plaintiff is a State resident residing off of the enclave, and the defendant is an enclave resident. A State court can hear the case if personal jurisdiction can be obtained over the defendant residing on the enclave. Arguably, reservation of the right to serve civil process allows the court to obtain personal jurisdiction over the defendant for the incident that arose on the installation, because allowing the service does not enlarge the State court's subject matter jurisdiction or apply the State's substantive law on the installation. It only brings the defendant before the court.

The substantive law that will apply to the case will be determined according to the State's conflict-of-laws rules. Where lex locii applies, the court will apply not its own law but that of the place where the case arose--the enclave. The law applicable to the enclave is discussed below in section 2-12. Alternatively, the law of the place that has the most contacts with the parties and case

may be applied. That may be the law where suit has been brought--State law. To the extent State law would apply in these circumstances, it would apply not incident to an unwarranted extension of State sovereignty or as a result of the reservation of the right to serve process, but rather as the neutral application of the State's conflicts rules.

State "long-arm" statutes present another problem. In Berube v. White Plains Iron Works Inc.,[404] an action for damages was filed on the basis of an incident taking place on a military reservation under exclusive jurisdiction. The defendant was a foreign corporation, not licensed to do business in the State, and its only significant commercial activity within the geographical limits of the State was its activity on the military reservation. The court held that service of process pursuant to a statute providing for substituted service on a foreign corporation "which does business in this State" was invalid.

A different result obtained in Swanson Painting Co. v. Painters Local Union No. 260,[405] decided by the Ninth Circuit in 1968. A Washington construction company contracted to build home foundations at Malmstrom Air Force Base in Montana. The Montana union subsequently sued for damages based on the Washington company's alleged breach of the labor contract entered into by the two. Suit was brought in Federal court in Montana. Subject matter jurisdiction was based on the Labor Management Relations Act of 1947.[406] Personal jurisdiction over the company was based on the Montana long-arm statute that permitted service on out-of-State defendants doing business in the State.[407] The court held that the defendant was doing business within the State for purposes of the statute. Exclusive jurisdiction over Malmstrom, the court held, "does not immunize the persons engaged therein from liability for breach of any duty arising from such activity."[408]

Swanson's avoidance of exclusive jurisdiction is reminiscent of Howard v. Commissioners of Louisville[409] which, logically extended into the area of service of process, would allow any service of process which does not interfere with Federal activity even on exclusive jurisdiction installations where there has been no reservation of the right to serve civil process.[410]

Mail service under long-arm statutes creates an interesting problem. A strict reading of reservations of the right to serve process might disallow mail service from another State and a similar result might obtain where a State that has reserved the right to serve process seeks to serve the process of another State.[411] Such a reading, however, is flawed because by necessity, any State serving process under a long-arm statute will not have reserved the right to serve process on an installation located in another State. The recipient of the long-arm service may attack the

jurisdiction and the process, but they should not assume that they can ignore mail service based on the exclusive jurisdictional status of the installation they reside on. It appears to be an open question whether a State that failed to reserve the right to serve process, could rely on their long-arm statute to reach the installation, under the "State within a State" view of jurisdiction.

Where the right to serve process has not been reserved, service may be voluntarily accepted or declined by the person to be served.[412]

States that reserve the right to serve civil process retain at the same time the right to serve criminal process. Regardless of whether the right to serve criminal process has been reserved, however, military offenders will be delivered to civil authorities for State prosecution under article 14 of the Uniform Code of Military Justice,[413] which provides:

> (a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.
>
> (b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender, after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

Military members will be delivered to civil officers on reasonable request.[414] Nonethless, the general court-martial convening authority may refuse delivery after considering the seriousness of the

offense charged, whether court-martial charges are pending against the alleged offender, whether a sentence imposed by court-martial is being served, and whether, under the existing military situation, the best interests of the service warrant retention in the armed forces.[415] A warrant, indictment, presentation, or similar process should accompany the request by the civil officer. Note that The Judge Advocate General has opined that a bail bondsman may enter military installations to seize offenders.[416] Where delivery to a civil officer is refused by Army authorities, a report must be made to The Judge Advocate General. With respect to extradition, military personnel will be treated as private persons. Personnel will not, therefore, be transferred from one State to another to make them amenable to civilian legal proceedings.[417]

c. Service on State and local juries. The Army's stated policy is to allow soldiers to fulfill civic responsibilities, including jury service,

consistent with military requirements.[418] This policy implements congressional[419] and Department of Defense[420] mandates.

Army regulations provide a blanket exemption from jury service for general officers, commanders, trainees, and soldiers assigned overseas or to tactical operating forces.[421] Jury service by these soldiers necessarily interferes with readiness and accomplishment of the military mission. Other soldiers may be exempted from jury duty if the special court-martial convening authority (or higher-level commander who has reserved exemption authority) determines that jury service would unreasonably interfere with the performance of the soldier's military duties or adversely affect the readiness of the soldier's unit.[422]

Soldiers serve on State and local juries in a permissive TDY status and may keep reimbursement for transportation, meals, parking, and similar

expenses. Juror attendance fees, however, must be paid to the United States.[423]

2-12. Civil law generally applicable on the Federal enclave and extension of State law by congressional consent

a. Civil laws which are the product of congressional action. Where military property is under exclusive jurisdiction or partial jurisdiction in which the State has not reserved the right to apply its civil law, State law as such does not apply. Although Congress has the power to legislate over these lands, it has not enacted any comprehensive body of civil law. Nevertheless, Federal statutes have been enacted in some fields which adopt or extend State principles of law. Some of these statutes permit State laws to apply as State law. Others adopt State law as Federal law.

In 1928, Congress, cognizant that the common law required the abatement of negligence claims on the death of an injured person,[424] enacted a statute adopting State wrongful death and injury laws as Federal law on enclaves:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the right of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.[425]

State principles become Federal law pursuant to this statute, permitting Federal courts to exercise Federal question jurisdiction over negligence cases arising on installations.[426] Note, however, that damages to personal or real property are not covered. The statute not only permits actions to be maintained where State law recognizes the existence of the action but also allows all State law relevant to such actions to apply, such as product liability theories.[427] This statute helps people on enclaves by bringing State law on the enclave as Federal law and accomplishes its objective without bringing the administrative machinery of the State onto the installation at the same time. Congress has, however, enacted other statutes which allow State law and State Government to operate on the installation as such.

In 1954, for example, Congress enacted as part of the Internal Revenue Code a section which provided:

> No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States.[428]

The unemployment compensation statute followed a much earlier statute designed to help enclave workers. In 1936, 2 years after the Supreme Court held in Murray v. Joe Gerrick & Co.[429] that the wrongful death and personal injury statute discussed above did not adopt State workmen's compensation laws, Congress enacted a statute providing that State workmen's compensation authorities:

> shall have the power . . . to apply such laws to all lands and premises owned or held by the United States . . . which is within the exterior boundaries of any State . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State . . .[430]

This self-implementing statute[431] is not a waiver of sovereign immunity. Consequently, the United States is not liable to directly pay workmen's compensation insurance for its employees or the employees of Government contractors.[432] Private employers on enclaves, such as Government contractors, must pay, although the cost is usually passed onto the United States as part of the contract cost. Contractor employees covered by this statute have attempted to sue the United States for injuries sustained on the job under the Federal Tort Claims Act. Several courts have held that the United States is immune

from suit under State "statutory employer" laws which immunize the person for whom the contractor works.[433] These laws, requiring as a prerequisite that the statutory employer pay workmen's compensation insurance premiums, have been made available to the United States despite the fact that the Government does not have to pay these premiums.

Other statutes allowing State regulation on enclaves have been enacted, recognizing that some activities on the installation affect the surrounding State's general welfare and should not be shielded by legislative jurisdiction. Thus, Congress has required coastal military commanders since 1799 to comply with State health and quarantine laws.[434] More recently and of greater practical concern to installation managers, Congress in 1958 made State wildlife management laws applicable on installations:

The Secretary of Defense shall, with respect to each military installation or facility . . . in a State or Territory--

(1) require that all hunting, fishing, and trapping . . . be in accordance with the fish and game laws of the State . . .

(2) require that an appropriate license for hunting, fishing, or trapping . . . be obtained, except that with respect to members of the Armed Forces, such a license may be required only if the State or Territory authorizes the issuance of a license to a member on active duty for a period of more than thirty days . . . without regard to residence requirements, and upon terms otherwise not less favorable than the terms upon which such a licenses issued to residents of that State or Territory. . . .[435]

Two years later, an additional law was passed to ensure Federal-State cooperation in wildlife management and to vest installation commanders with the authority to issue State permits:

> The Secretary of Defense is hereby authorized to carry out a program of planning, development, maintenance and coordination of wildlife, fish and game conservation and rehabilitation in military reservations in accordance with a cooperative plan mutually agreed upon by the Secretary of Defense, the Secretary of Interior, and the appropriate State agency designated by the State in which the reservation is located. . . . Such cooperative plan may stipulate the issuance of special State hunting and fishing permits to individuals and require the payment of a nominal fee therefor, which fee shall be utilized for the protection, conservation and

> management of fish and wildlife, including habitat improvement and related activities in accordance with the cooperative plan: Provided, That the Commanding Officer of the reservation or persons designated by him are authorized to enforce such special hunting and fishing permits and to collect the fees therefor, acting as agent or agents for the State if the cooperative plan so provides.[436]

The 1958 statute, resulting from State complaints that local commanders were damaging State conservation programs,[437] opened military reservations to public hunting, fishing, and trapping. The 1960 law complemented the earlier statute, providing comprehensive treatment of the problem. Where the State has retained legislative jurisdiction, State fish and game laws apply on the reservation as State law and are enforceable by State officials. At the same time, the United

States has adopted State game laws as Federal law that are consequently criminally enforceable by Federal officials.[438] State conservation officials shall have access to installations to "effect measures" for conservation of natural resources.[439] Military personnel are not required to purchase State licenses to hunt, fish, or trap on exclusive jurisdiction areas if State laws discriminate against them with respect to purchase of licenses.[440]

The third class of statutes enacted by Congress permits States to tax on enclaves solely for their own benefit even where there has been no reservation of the right to tax. Under these statutes, States can levy and enforce sales and use taxes,[441] income taxes,[442] and taxes on motor vehicle fuels sold by exchanges, commissaries, or filling stations when not intended for the exclusive use of the United States.[443] In each case, the taxing power is allowed to the State or "any duly constituted taxing

authority." One additional statute permits State or local Governments to tax private lessees of Governmental property.[444]

Not all State taxes on enclave residents or employees are lawfully applied to them. In United States v. Lewisburg Area School District,[445] a municipality levied an occupation tax on enclave residents, basing valuation of the tax on the nature of employment and the average income for the occupation of the individual concerned. The United States argued that the tax was not an income tax. Nevertheless, the court, noting that statutorily an income tax is "any tax levied on, with respect to, or measured by net income, gross income, or gross receipts"[446] concluded that the occupation tax was lawfully applied to the residents of the enclave, although an arbitrary assessment of $30 levied on housewives was not an income tax.[447]

In 1983 a similar result followed in United States v. City and County of Denver[448] when Denver

attempted to apply its Employee Occupational Privilege Tax to civilians at Lowry Air Force Base. The tax was a flat rate assessment against all employees in the city without regard to income so long as the individual concerned received at least $250 per month in pay. The court concluded that the United States had standing because "[a]s in the Lewisburg case, the 'interest which the Government seeks to protect is its own exclusive rights [sic] as sovereign, and the injury it alleges is a trespass against those sovereign rights.'"[449] Although the legislative history of the Buck Act demonstrated to the court that the definition of an income tax "must of necessity cover a broad field because of the great variations to be found between the different State laws"[450] and "[t]he intent of [the Senate] Committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or by other name),"[451] the

court held that the flat rate tax was imposed on the privilege of being employed and was therefore an excise tax, not covered by the Buck Act.[452] The decision in the Denver case is in accord with the weight of authority.[453]

Congress has adopted or extended other State laws on other types of Federal facilities. Thus, State criminal and civil laws directly apply in national parks,[454] national forests,[455] migratory-bird reservations,[456] low-cost housing projects,[457] Lanham Act housing,[458] and defense housing.[459] State principles of law, other than those relating to mineral leasing, are adopted as Federal law for the outer Continental Shelf,[460] and State water laws continue to apply on lands acquired for power[461] and reclamation[462] projects. These provisions may become relevant to the military lawyer in case land originally acquired for one of the specified purposes is transferred to a military department or

obtained under permit. State law may continue to apply while the land is used for military purposes.

b. Civil law absent congressional action. The Federal statutes discussed above leave serious gaps. Torts not involving death or personal injury, for example, are not covered by these statutes; nor are many other important legal areas in which questions can arise, such as contracts, sales, agency, probate and administrative actions, guardianship, and family relations.

In Chicago Rock Island & Pacific Railway Company v. McGlinn,[463] the Supreme Court was presented with the question as to what law applies after the Federal Government has acquired exclusive legislative jurisdiction over an area when no statute of Congress addresses the matter. The appellee owned a cow which strayed onto the Fort Leavenworth Military Reservation in Kansas. The appellant operated a railroad line through the post and one of its trains ran over and killed the cow.

The suit was based on an 1874 Kansas statute that made railroads liable for death of livestock unless rights-of-way had been fenced. It so happened that the United States had not acquired exclusive jurisdiction until 1875 and the question was whether the earlier Kansas statute continued to govern the rights of the parties. The Court held that the principle of liability Stated in the 1874 State law applied absent action by the new sovereign displacing the preexisting law:

> . . . It is general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force

until abrogated or changed by the new Government or sovereign. . . .[464]

Later in Arlington Hotel Co. v. Fant,[465] an innkeeper on exclusive jurisdiction property was held liable as an insurer of a guest's property under State law effective when jurisdiction was acquired, although State law subsequently changed to require proof of an innkeeper's negligence. Subsequent court decisions have established the proposition that common law, as well as statutory law, principles existing at the time the United States acquires exclusive jurisdiction are adopted.[466] In the past, it was generally accepted that the principles carried over become Federal law,[467] but the Supreme Court's decision in Paul v. United States,[468] discussed below, casts some doubt on this proposition.

Because the type of legislative jurisdiction exercised, as well as the date of its acquisition,

varies from tract to tract on installations, substantive rules of law governing a given transaction may vary from tract to tract. This effect of the McGlinn doctrine may produce irrational results where a claim affects an entire installation.[469]

Courts recognize three situations in which State laws will not become Federal law under McGlinn doctrine: where State laws were not "intended for the protection of private rights;"[470] where State laws require enforcement by a State administrative agency;[471] and where the State laws conflict with Federal law or policy.[472] The first two exceptions are subject to some doubt since the United States Supreme Court's 1963 decision in Paul v. United States:[473]

> In Paul, the Court was asked to decide whether California can enforce minimum wholesale price regulations on distributors of milk sold to the

United States at three military installations (Travis Air Force Base, Castle Air Force Base, and Oakland Army Terminal) located within California and used for strictly military consumption, for resale at federal commissaries, and for consumption or resale at various military clubs and post exchanges.[474]

Finding an inconsistency between the State minimum price scheme and the requirement of the Armed Services Procurement Regulation (applicable only to appropriated fund expenditures)[475] that "procurement shall be made on a competitive basis,"[476] the Court held invalid the application of the State pricing law to milk paid for with appropriated funds.[477] The Court, however, stated that it would uphold the application of the State's current milk price regulations on the purchase of milk for use at military clubs and post exchanges (not subject to the same procurement regulations) if, on remand, it

developed that the underlying price control scheme was substantially similar to the scheme in effect at the time of the Federal acquisition of "exclusive jurisdiction."

Clearly, the dispute in Paul did not involve "private rights." Equally clear is the fact that the State law was enforced by a State administrative official, the Director of Agriculture of California, who was responsible for setting minimum prices. Even more surprisingly, the State law that was to be applied was the current law:

> Yet if there were price control of milk at the time of acquisition and the same basic scheme has been in effect since that time, we fail to see why the current one, albeit in the form of different regulations, would not reach those purchase and sales of milk on the federal enclave made from nonappropriated funds.[478]

Insofar as Paul held that Federal appropriated funds procurement policy precluded the State milk pricing scheme from operating on the California bases, the case provides a good illustration of the corollary to McGlinn that Federal law or policy will displace the Federalized State law that applies on the installation after the transfer of legislative jurisdiction.

Lord v. Local Union No. 2088[479] provides another illustration of how Federal policy will displace State law. A Government contractor and a union concluded a collective bargaining agreement that provided for a union security clause, requiring all workers be members of the union. The agreement applied to Patrick Air Force Base and Canaveral Air Force Station in Florida. Nonunion workers sued based on the Florida constitution that, as amended in 1943, contained a right-to-work provision. By a direct application of McGlinn, the provision could not apply on Patrick Air Force Base because

legislative jurisdiction over the base was obtained before 1943. It did apply on Canaveral Air Force Station, however, because jurisdiction over the station was obtained after 1943. Nevertheless, the court found a Federal policy in favor of union security clauses in the language of the National Labor Relations Act. Consequently, because Federal policy was inconsistent with State law, the State law was displaced.[480]

Displacement of State law applicable on an enclave through McGlinn by subsequently adopted Federal law or policy is not a function of Federal supremacy. In this instance, new Federal law or policy simply displaces prior Federal law. Although this prior Federal law was originally State law before the transfer of legislative jurisdiction, it continued to apply after the transfer of jurisdiction as Federal law. If an installation has additional parcels of land over which the United States has less than exclusive jurisdiction, a

subsequently adopted Federal law or policy may displace the Federalized State law on the exclusive jurisdiction parcel and at the same time preempt under Federal supremacy State law existing as such on the nonexclusive jurisdiction parcels, yielding a uniform application of law. Where there is no Federal law or policy, courts must look to practical solutions to prevent inconsistent laws from applying on different parts of an installation.[481]

2-13. Federal preemption of State law and regulation

Federal supremacy insulates military reservations and Federal activities from State regulation independent of legislative jurisdiction. The effect of supremacy is to give immunity to distinctly Federal activities. Derived from the supremacy clause of the Constitution,[482] the doctrine was first enunciated by the Supreme Court in McCulloch v.

Maryland,[483] in which the Court considered the constitutionality of a Maryland statute requiring a bank chartered by Congress to issue notes on stamped paper purchased from a State agency, or to pay a tax instead. Holding the State law unconstitutional, the Court Stated:

> [T]he Government of the Union, though limited in its powers is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying "this constitution, and

> the laws of the United States, which shall be made in pursuance thereof . . . shall be the supreme law of the land." . . .
>
> . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. . . .[484]

Federal supremacy requires that State laws recede which interfere with the ownership and use of real property by the Federal Government. In Fort Leavenworth Railroad v. Lowe,[485] the Supreme Court

recognized supremacy as an independent means of fending off the State:

> . . . The United States, therefore, retained after the admission of the State, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the General Government, that part of the tract which was actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes.
>
> . . . [Land owned by the United States but over which it does not exercise jurisdiction] will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general

> Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.[486]

Thus, a State cannot tax Federal land,[487] whether by special tax or assessment for local improvement which benefits the Federal property.[488] The Comptroller General has ruled that an irrigation district's assessment of an operation charge separate from the cost of water furnished is an involuntary exaction and should not be paid.[489] Charges for water, garbage collection, or sewage service may be assessed when based on the quantity of water or service furnished, although such charges may not be assessed, even under contract, when the assessment is really a general tax.[490]

The Federal immunity principle affects other activities associated with ownership and operation of a military reservation. For instance, a State

cannot condemn Federal land without the consent of the United States;[491] military authorities need not, as a matter of law, comply with State safety and fire laws; a State may not enforce within a Federal installation a State statute requiring the posting of notices wherever oleomargarine is served;[492] nor may a State enforce its game laws against Federal officers killing deer on Federal lands to prevent damages to plant life.[493] It has been held that Federal authorities may not be required to comply with building codes and zoning requirements.[494] Nor may a State require licensing of a Government contractor as a prerequisite to performance of the contract.[495]

With respect to real property transactions, the Federal Government is not required to comply with State recording requirements to protect its rights.[496] In disposing of property, the United States may restrict its further disposition in a manner not provided for by State laws.[497] There have been

instances of property disposed of by the United States subject to an absolute restraint against alienation.[498]

It has been held that a local subdivision could not require a Federal inspector to comply with local requirements concerning food handlers.[499] This suggests a broader problem involving whether Federal authorities may be subjected to State inspection requirements of various types. In Mayo v. United States[500] the Supreme Court held that a State is without constitutional power to exact an inspection fee with respect to fertilizers owned by the Federal Government:

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of Government. Such a requirement is prohibited by the supremacy clause. . . .

These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through Federal officials. Admittedly the State inspection service is to protect consumers from fraud but in carrying out such protection, the Federal Government must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. . . . But where, as here, the Governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.[501]

Another example arose in 1983 when Hawaii demanded that the military accede to State law and place military working dogs in quarantine for 120 days on arrival in the State. The Judge Advocate General advised that Federal supremacy made compliance unnecessary, although he urged voluntary cooperation.[502]

In all of these cases, assertion of Federal immunity simply recognizes that the States cannot interfere with essential Federal functions. This applies equally to activities conducted off the installation. Thus, The Judge Advocate General has advised that Army personnel may enter private property to examine, secure, and remove downed aircraft despite State law that might prohibit such an unpermitted entry on land.[503] Federal immunity applies as well to State attempts to regulate operation of motor vehicles by Federal employees and military personnel.

In Jonnson v. Maryland,[504] the Supreme Court held that a State could not constitutionally require a Federal employee to secure a driver's permit before operating a motor vehicle to perform Federal duties:

> Of course an employee of the United States does not secure a general immunity from State law while acting in the course of his employment. . . . It very well may be that, when the United States has not spoken, the subjection to local law would extend to general rules that might affect incidentally the mode of carrying out the employment--as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets. . . . But even the most unquestionable and most universally applicable of State laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and

in pursuance of the laws of the United States. In Re Neagle, 135 U.S. 1, 34 L.Ed. 55, 10 Sup. Ct. Rep. 658.

It seems to us that the immunity of the instruments of the United States from State control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a State officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and

> that duty it must be presumed has been performed.[505]

Federal supremacy insulates military personnel and employees from State regulation that would interfere with the performance of assigned duties. A failure to follow State law not directly related to mission performance does not necessarily shield Army personnel. Army policy affirms this:

> Installation commanders will impress on service members and civilian employees the importance of complying with State and local traffic laws when operating motor vehicles within these jurisdictions. When military necessity requires movement on public roads and highways of Government vehicles that exceed legal limitations or regulations, or that subject highway users to unusual hazards, prior coordination will be effected with the

> appropriate civilian law enforcement agency prior to movement.[506]

Although military status alone may not exempt personnel from civilian traffic laws,[507] Army policy recognizes that "military necessity" can override State law.

In Lilly v. West Virginia[508] a Federal prohibition agent, who struck and killed a pedestrian while pursuing a suspect, was excused from city speed limits:

> The traffic ordinances of a city prescribing who shall have the right of way at crossings and fixing speed limits for vehicles are ordinarily binding upon officials of the federal government as upon all other citizens. . . . Such ordinances, however, are not to be construed as applying to public officials engaged in the performance of a

> public duty where speed and the right of way are a necessity. The ordinance . . . makes no exemption in favor of firemen going to a fire or peace officers pursuing criminals, but it certainly could not have been intended that pedestrians at street intersections should have the right of way over such firemen or officers, or that firemen or officers under such circumstances should be limited to a speed of 25 miles, or required to slow down at intersections as to have their vehicles under control . . . .[509]

Although the Attorney General stated in 1962 that parking fees that are taxes would be unconstitutional applied to a Federal vehicle,[510] he considered parking ordinances and charges otherwise valid. Although the Attorney General stated at the time that representation would be provided Government drivers charged with parking violations,

the immunity of the United States would not be raised unless the violation was compelled by the employee's duties.[511] While the Comptroller General maintains that certain municipal parking meter fees are unconstitutional attempts to tax, nevertheless, it will allow appropriated funds to be used to reimburse Government drivers for the payment of parking fees. This does not include fees that impose an impermissible burden on the performance of a Federal function, such as carrying the mail, or which have been held by a court to be tax or revenue raising measures.[512]

Supremacy prevents State interference with Federal activities lawfully authorized by Congress directly or by other Federal officials acting under a delegated power. Where the activity is properly authorized by Federal law, Federal law will preempt any conflicting State law. Preempting Federal law includes Federal regulations, as recognized in Fidelity Federal Savings and Loan Association v. De

La Cuesta,[513] where the Supreme Court upheld a Federal Home Loan Bank Board regulation permitting use of "due on sale" clauses in Federal savings and loan association mortgages despite California law restricting the use of such clauses. The preemption doctrine is strong and broadly construed:

> The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly Stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Absent explicit preemptive language, Congress' intent to supersede State law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable inference

that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." Rice and Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Even where Congress has not completely displaced State regulation in a specific area, State law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when State law "stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Jones v. Rath Packing Co., 430 U.S. at 526; Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 773 (1947). These principles are not applicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." Free v. Bland, 369 U.S. 663 666 (1962); see also Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981). Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he had exceeded his statutory authority or acted arbitrarily.

United States v. Shimer, 367 U.S. 374, 381-382 (1961). When the administrator promulgates regulations intended to pre-empt State law, the court's inquiry is similarly limited:

> "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Id. at 383.

See also Blum v. Bacon, 457 U.S. 132, 145-148 (1982); Ridgway v. Ridgway, 454 U.S., at 57 (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute); Free v. Bland, 369 U.S., at 668. A preemptive regulation's force does

> not depend on express congressional authorization to displace State law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not, disturb State law is not dispositive. See United States v. Shimer, 367 U.S., at 381-383. . . .[514]

Consequently, Army regulations promulgated under the Secretary of the Army's general rulemaking authority[515] can preempt State law.[516] A more difficult question arises in connection with subordinate regulations and policies. Logically, if a regulation or policy promulgated by a local commander is within the commander's authority to make, then it should preempt conflicting State law. The focus in cases involving local regulations is on the power to regulate. Once resolved in the commander's favor, preemption should follow upon a

finding that there is a conflict between the regulation and State law.[517]

Section V
Authority of the Installation Commander and Protection of the Installation Under Federal Law

2-14. Command authority generally

Command of an Army installation or activity is the responsibility of the senior regularly assigned officer present, unless he or she is ineligible under Army regulations.[518] Except in a few limited areas, there is no general statutory authority for the regulations and actions of a post commander. Some post regulations are criminally enforceable against civilians and others where a statute so provides. Generally, however, neither the Secretary of the Army nor a post commander can issue

criminally enforceable regulations effective against civilians. On the other hand, post regulations generally are enforceable against military personnel under the Uniform Code of Military Justice,[519] and disciplinary action against civilian employees of the Army can be taken for violations of regulations affecting civilian personnel.[520]

To the extent that authority for a commander's actions cannot be found in statute or superior regulation, a concept of "inherent authority" has been inferred from Cafeteria & Restaurant Workers Union v. McElroy,[521] which observed that commanders have an "historically unquestioned power" to exclude persons from their installations.[522] The Burger Court echoed Cafeteria & Restaurant Workers Union in Greer v. Spock[523] when, holding that military installations are not public forums for civilian political activity, the Court observed: "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear

danger to the loyalty, discipline, or morale of troops on the base under his command."[524] Inherent authority is the basis for numerous command actions, some of which are reviewed in this section.

2-15. Access to military installations, restricted areas, and Federal areas

Installation commanders are required to establish appropriate rules governing the entry of persons on and exit from an installation.[525] The authority of a post commander to exclude civilians from a military post is a proprietorial right and does not depend upon statute or legislative jurisdiction.[526] In Cafeteria & Restaurant Workers Union v. McElroy,[527] the Supreme Court acknowledged and reaffirmed the broad power of a military commander to exclude civilians from a military reservation.

Although a post commander may exclude individuals based on proprietorial right, section

1382, title 18, United States Code, provides statutory authority to exclude and makes post regulations criminally enforceable against trespassers:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof--Shall be fined not more than $500 or imprisoned not more than six months, or both.

The first part of this statute, which prohibits entry upon a reservation "for any purpose prohibited

by law or lawful regulation," has limited usefulness because of the difficulty in proving that the initial entry onto the reservation is for a prohibited purpose. Specific intent to violate section 1382 or the underlying law or regulation need not be shown; it suffices to prove that the defendant intended the underlying act.[528]

Irrespective of intent, where prosecution is based on unlawful entry for the purpose of violating a regulation, the defendant must have notice of the regulation because of the Administrative Procedure Act (APA). It requires that "substantive rules of general applicability adopted as authorized by law" be published in the Federal Register.[529] "Except to the extent that a person has actual and timely notice of the terms [of a regulation required to be published] , a person may not in any manner . . . be adversely affected" by it.[530] Although The Judge Advocate General and the Adjutant General have disagreed whether local regulations that are the

basis for section 1382 prosecutions are subject to the publication requirement,[531] a number of cases suggest that these regulations should be published.[532] Failure to publish does not preclude prosecution, however. Actual notice will suffice.[533]

The second clause of section 1382 is a considerable help to the post commander in indirectly enforcing post regulations against civilians. The advantage to the second part of the statute is that reentry for any purpose after having been removed or after being ordered not to reenter may be prosecuted.[534] Prosecution under either part of the statute is contingent on showing that the offense took place "within the jurisdiction of the United States."[535] The commanding officer should personally issue an order not to reenter.[536] The order should be in writing and should be personally served on the individual or otherwise delivered in a way that will guarantee proof of receipt later.[537]

Bar orders must be reasonable and not arbitrary or capricious. Cases in which bar orders have been challenged as violating fifth amendment due process guarantees have been unsuccessful.[538] A commander whose bar order is neither arbitrary nor capricious need not give prior notice or afford a hearing before excluding civilians. Nevertheless, where a bar order would have the effect of denying someone access to a post service whose governing regulation requires some type of hearing or other opportunity to be heard, issuance of a limited bar order may avoid due process litigation.[539] Such a limited bar order would permit, for example, a retired military person access to the post exchange, commissary or medical treatment facility and roads leading thereto, but deny access to the remainder of the installation. In fact, where a retiree's interests are at stake, and particularly where a bar would deny a benefit whose basis is in statute, such as the entitlement to shop in the commissary or receive

medical and dental care, the scope of the bar should bear a reasonable relationship to the Federal interest to be protected.[540]

Where security or protection of Government property or facilities is the dominant interest, section 21 of the Internal Security Act of 1950[541] as implemented by the Department of Defense,[542] authorizes post commanders to control access by issuing regulations with penal force:

> Whoever willfully shall violate any such regulation or order as . . . promulgated . . . by any military commander designated by the Secretary of Defense, . . . for the protection or security of military [installations] . . . relating to . . . the ingress thereto or egress or removal of persons therefrom, or otherwise providing for safeguarding the same against destruction, loss, or injury by accident or enemy action, sabotage or other subversive

> actions, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.

This statute is written in broad terms and appears to apply not only to regulations tied to the protection of sensitive Government property but to any regulation which protects the installation. In light of the legislative context in which the statute was enacted,[543] commanders may be acting ultra vires who resort to it to enforce regulations that resemble general municipal ordinances. Nevertheless, the statute is drafted in a way that permits several interpretations of its intent.[544] However section 21 should be read, implementing regulations must comply with the same publication requirements as apply to section 1382 of title 18.[545]

Based on the authority of section 21, commanders can establish "Federal areas"[546] or "national defense

areas"[547] off installations to protect military property. Intended to provide authority to establish Federal control over nuclear or chemical accident sites or plane crashes where classified documents or instruments are on board, this extension of Federal authority has been upheld in court.[548]

2-16. Control of speech, appearance, and religion on military installations

The first amendment rights of speech, association and peaceful assembly, although secured to soldier and civilian alike by Federal laws and the Constitution, are not absolute. The need for an effective and disciplined Army justifies certain restraints on soldiers and civilians, some of which are contained in Department of Defense and Army regulations.[551]

a. Military demonstrations. Soldiers may not participate in picket lines or any other public demonstration on post, while in uniform, on duty, in a foreign country, when the activity constitutes a breach of law and order, or when violence is reasonably likely to result.[552]

b. Civilian demonstrations. A commander's power to control on-post demonstrations by civilians hinges largely on the ability to control access to the military installation. In 1961, the Supreme Court in Cafeteria and Restaurant Workers v. McElroy[553] reaffirmed a commander's broad power to exclude civilians from military bases.

It is well settled that Installation Post Commanders can, under the authority conferred on them by statutes and regulations, in their discretion, exclude private persons and property therefrom, or admit them under such restrictions as they may prescribe in the interest of good order and military discipline.[554]

In 1972, however, the Supreme Court retreated from this broad view in the case of Flower v. United States,[555] reversing in a per curiam decision John Flower's conviction for reentering Fort Sam Houston in violation of a bar order.[556] Flower originally was barred for distributing leaflets within the installation on New Braunfels Avenue, a thoroughfare through the post and a traffic artery in San Antonio, Texas.[557] He reentered to resume distribution of leaflets. The Supreme Court held that the post was open for first amendment activity because New Braunfels Avenue "was a completely open street" and the military "had abandoned any claim that it has special interests in who walks, talks or distributes leaflets on the avenue."[558]

Flower and the cases which relied on it[559] were severely limited four years later in Greer v. Spock[560] in which the Court upheld the Fort Dix Commander's denial of permission to political candidates to conduct a political rally and to distribute

literature, reversing the Third Circuit, which had allowed the rally to proceed. Observing that Flower only recognized that New Braunfels Avenue was rendered no different from any other public street by the military's abandonment of special interests, the Court continued:

> The Court of Appeals was mistaken, therefore, in thinking that the Flower case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that Flower stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government then that place becomes a "public forum" for the purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist. . . ."[561]

Although the Court in Flower decided that the Army abandoned any claim of special interests, the Court in Spock found that there had been no abandonment at Fort Dix,[562] despite the fact--noted in Justice Brennan's dissent--that Fort Dix was "no less open than Fort Sam Houston."[563]

Indicia of continuing control were regular patrols by military police and signs on installation roads limiting activity on the post.[564] Because of the "special constitutional function of the military in our national life,"[565] and the fact that it is "the primary business of armies . . . to fight or be ready to fight,"[566] the Court concluded that "the business of a military installation like Fort Dix is to train soldiers, not to provide a 'public forum'"[567] and that "the notion that Federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thought by private citizens is thus historically and constitutionally

false."[568] Based on the Commander's letter to Doctor Spock that stated that the planned rally would "dilute" the quality of military training at the post and that permission would give the appearance of support by the Commander for a candidate,[569] the Court found constitutional an even-handed policy calculated to keep "official military activities . . . wholly free of entanglement with partisan political campaigns of any kind."[570]

Greer v. Spock remains the principal authority on which judge advocates should rely to block demonstrative activity on military installations. Note that neither Spock nor any Federal law or regulation makes demonstrative activity unlawful. Installations must promulgate their own regulations barring this activity.

Installations can be made public forums by permitting access to persons or groups who engage in speech or other first amendment expression which is

not supportive of the military mission. In Spock, the Court observed:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum. . . . The decision of the military authorities that a civilian lecture on drug abuse, a religious service by a visiting preacher at the base chapel or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.[571]

In Jones v. North Carolina Prisoners' Union,[572] decided the year after Spock, the Court held in the case of a prison system that denied bulk mailing and

meeting rights to a prisoners' group while extending them to the Jaycees, Alcoholics Anonymous, and the Boy Scouts, that the prison system had only to "demonstrate a rational basis for their distinctions between organizational groups."[573] No public forum was created, the Court found, since the Jaycees and Alcoholics Anonymous served a rehabilitative purpose "working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution."[574]

What these cases appear to state is that so long as a place remains committed to its Government use and historically has not been appropriate for free expression, the Government is free to allow any activities of its choice on the installation and deny access to others so long as there is no unlawful discrimination--measured by whether a rational distinction can be drawn between the activities. Where activity permitted on the

installation diverges so widely from the historical or customary use of the facility, then the special interests that keep the post from being a public forum dissipate and a public forum is created into which any group is free to come.

Members of the public are frequently invited onto military installations for open houses whose purpose is to establish, maintain, and enhance good relations between the military and its host communities. In Persons for Free Speech at SAC v. United States Air Force,[575] the Eighth Circuit held that good community relations were supportive of the military mission of Offutt Air Force Base and that the wholesale admission of the civilian population to the base did not create a public forum in which antinuclear activists could participate.[576]

The plaintiffs argued that the Air Force was conveying an ideological message "that a high technology, nuclear-oriented military system is a viable [sic] way for the United States to conduct

itself in world affairs,"[577] which converted the open house into a public forum. The court rejected this argument on the ground that "[n]o public forum can arise from the 'ideological' reflection of the current State of the military [or its choice of strategy or weapons systems] because historically, traditionally and constitutionally this 'reflection' is mandated by the civilian sector."[578] The court rejected the assertion that the open house represented Government "speech." Even if it were conceded that it was speech, the court concluded that there was a legitimate Governmental interest in the open house, precluding a public forum, because the Government was simply "showing its citizens, who pay for the military, how it is spending their money."[579] The Ninth Circuit took the opposite position in United States v. Albertini,[580] reversing a conviction for reentry in violation of a bar order during an open house at Hickam Air Force Base. Resurrecting Flower, the court held that control

over access was "effectively abandoned" over the open portions of the base.[581] Because the Air Force made the base "temporarily, a focus of public attention concerning the role of the military in American society . . . Hickam Air Force Base was temporarily opened to the public for purposes inextricably associated with and appropriate for expression."[582]

The court distinguished Spock in several respects. Unlike Doctor Spock's message at Fort Dix, which was intended for the soldiers stationed there, James Albertini's antinuclear message was intended for the public attending the open house.[583] Moreover, while the rally at Fort Dix would have disturbed the training mission, normal military routine at Hickam Air Force Base was upset by the military itself.[584] Consequently, in the court's view, the Air Force created at least a limited public forum.

Given the split between the circuits, judge advocates should be aware that Federal courts may find that an open house will create a limited public forum. To minimize the litigation advantage of dissidents seeking access, installations should maximize control over the installation and minimize displays that a court could construe as "Government speech." Note, however, that the Ninth Circuit decision in Albertini does not mandate open access for expressive activity simply because the public is admitted to an installation.

Albertini was reversed on appeal by the Supreme Court.[585] The Court did not reach the "public forum" issue because it found that Albertini was properly prosecuted because he had been previously barred from Hickam AFB. In dicta, the Court labelled the conclusion of the court of appeals that Hickam had become a public forum during the open house as "dubious," and stated that "the record does not suggest that the military so completely abandoned

control that the base became indistinguishable from a public street as in Flower."[586] Coupled with the Court's decision in Jones v. North Carolina Prisoner's Union, the dicta in Albertini points to a conclusion that the holding of an open house, even where certain groups are excluded while others are invited to set up booths or displays, is permissible and does not turn the installation into a "limited" public forum.[587]

Even where a public forum exists, reasonable time, place, and manner restrictions may be placed on expressive activity and content-based prohibitions may be applied where "narrowly drawn to effectuate a compelling State interest."[588] In the military context, Department of Defense policy requires commanders to prohibit any expressive activity which could interfere with or prevent the orderly accomplishment of the installation's mission or which presents a clear danger to the loyalty, discipline, or morale of troops.[589] Dash v.

Commanding General,[590] decided before Greer v. Spock, held military installations are not public forums and endorsed the "clear danger" test, upholding the denial of military facilities to noncommissioned officers for an open meeting to discuss the Vietnam War.

Clear danger does not mean imminent danger.[591] A clear tendency to produce harm suffices.[592] Whether particular speech poses a clear danger depends on the circumstances; "[a] relatively mild statement of dissatisfaction with military policy made at the front line of combat might be unprotected whereas the same statement would be protected in another place."[593]

c. Distribution of literature. Distribution of literature, including "underground newspapers," cannot be prohibited across the board[594] and mere possession of literature by a soldier, in the absence of an attempt to distribute, may never be prohibited in any instance, nor may the owner be

disciplined.[595] Soldier participation in off-post, off-duty publication of literature is also insulated from military interference,[596] although if the content of the literature violates Federal law, the author may be subject to criminal charges.[597]

Although blanket prohibition of distribution is precluded, distribution can be regulated. While the commander is prohibited from interfering with distribution of publications "through official outlets such as the post exchange and military libraries,"

> In the case of distribution of publications through other than, official outlets, a Commander may require that prior approval be obtained . . . in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would

materially interfere with the accomplishment of a military mission.[598]

Army policy adopts the standard of clear danger to loyalty, discipline, and morale, but does not include the material interference test, although since the clear danger standard is obviously intended to safeguard the military mission, a determination that a clear danger exists is equivalent to concluding that there would be material interference.[599] The cornerstone of a commander's control over unofficial distribution is the option to require prior approval.[600] Just as local action is required to bar all demonstrative activity from the installation, local action is required to make prior approval mandatory.[601]

The right to restrict the distribution of literature must be exercised reasonably. Personal disapproval of the content of literature is not a ground to delay distribution.[602] Even if the

publication is critical--even unfairly critical--of Government policies or officials, the commander should not act.[603]

Even when a publication poses a clear danger, the installation commander may only delay its dissemination, notify DA immediately, and await final determination by the DA.[604] The decision to delay distribution need not be preceded by a hearing. In Schneider v. Laird,[605] a post commander delayed distribution of the first two issues of an underground newspaper called "The Daisy," but the DA overruled this decision. Later, the same installation commander delayed issue number four and the DA ratified the decision. Schneider, a serviceman who prepared and printed "The Daisy," sued in Federal district court, asserting he was entitled to a hearing. The Tenth Circuit affirmed the district court's decision, upholding the right of the commander to ban distribution without offering the right to a hearing:

> The unique posture and ability of a commander officer to comprehend internal threats to his troops must augur against Schneider's position that the military's failure to hold a hearing before final determination deprived him of due process.[606]

Soldiers, as well as civilians, may exercise their constitutional right to "petition the Government of a redress of grievances." Department of Defense policy permits a service member to

> sign a petition for specific legislative action or a petition to place a candidate's name on an election ballot, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen and not as a representative of the Armed Forces.[607]

The right of members of the Armed Forces to petition Congress is also protected by statute:

> [no] person may restrict any member of the armed force in communicating with a Member of Congress unless the communication is unlawful or violates a regulation necessary to the security of the United States.[608]

Nevertheless, Carlson v. Schlesinger,[609] ruled that a commander could prohibit the public circulation for the purpose of obtaining signatures of an anti-war petition in Vietnam. The court was quick to add, however, that although war conditions justified the exercise of the commander's discretion in this case, service members retain both a statutory and a first amendment right to petition Congress.

In 1980, the Supreme Court decided in Brown v. Glines[610] that petitions can be treated like any other

kind of literature for which prior command approval can be required. Air Force regulations required prior command approval for the on-base collection of signatures on a petition. Captain Glines, a reservist on active duty, gave a petition concerning grooming standards to a sergeant at an air base in Guam while Glines was there on a training flight. The Court sustained his removal from active duty, concluding that while individual petitioning of Congress is protected by statute, collective petitioning is not and that prior approval of petitions--and literature generally--can be required on any installation:

> Without the opportunity to review materials before they are dispersed throughout his base, a military commander could not avert possible disruptions among his troops. Since a commander is charged with maintaining morale, discipline, and readiness, he must have

> authority over the distribution of materials that could affect adversely these essential attributes of an effective military force. . . .[611] Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them. And members of the armed services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster. Since the prior approval requirement supports commanders' authority to maintain basic discipline required at nearly every military installation, it does not offend the First Amendment.[612]

d. Appearance standards in installation facilities. No statute or regulation provides guidance to installation commanders in setting appearance standards for installation facilities.[613] However, as part of their general authority over

installations, commanders may issue appearance standards which are neither overbroad nor vague:[614]

> Commanders are limited in their ability to enforce appearance standards upon dependents. While commanders are responsible for the welfare and morale of their organizations, unless a particular dress/appearance standard relates directly and substantially to the preservation of law and order, health, welfare, morals, or safety of the military community, there is no legal basis upon which to limit dependent appearance.[615]

The same standard should apply to off-duty soldiers wearing civilian attire. Dependents, retirees, and casual visitors who violate appearance regulations are subject to bars from the installation[616] or from use of a particular facility.[617]

In Kelley v. Johnson,[618] a police officer challenged appearance standards insofar as they restricted hair length, arguing inter alia that the due process clause of the fourteenth amendment affords protection against unconstitutional intrusions into a liberty interest in personal appearance.[619] The Court sustained the regulation, holding that whatever liberty there may be in personal appearance, the police officer could not demonstrate the absence of a rational connection between the regulation and the purpose it was intended to serve.[620] The Court saw that a rational justification for uniform appearance standards could be "a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself".[621]

The standard applied by the Supreme Court in Johnson followed from the fact that Kelley was a

public employee and because of the "wide latitude accorded the Government in the 'dispatch of its own internal affairs.'"[622]

In East Hartford Education Association v. Board of Education of East Hartford,[623] the Second Circuit observed in the case of a due process challenge to a dress code for teachers that "[t]here is substantial danger in expanding the reach of due process to cover cases such as this."[624] Neither Kelley v. Johnson nor East Hartford Education Association clearly hold that there is no protected liberty interest in personal appearance, although the tenor of the decisions suggests there is none, or at least an extremely diluted interest. Challenges to installation appearance standards should be rebuffed on the ground that the rights to privacy and liberty that might be asserted in these contexts should be limited "only to the most basic personal decisions."[625]

To the extent there is some privacy or liberty interest that a family member, visitor, or off-duty soldier might assess, the standard a court will apply in evaluating the constitutionality of the regulation is unclear. Nevertheless, the standard advised by The Judge Advocate General--that regulations relate directly and substantially to the legitimate concerns of the installation--exceeds the burden defined in Kelley v. Johnson[626] and, given the treatment of personal appearance cases by the courts, will almost certainly be sustained when challenged:

> [M]atters of appearance and dress have always been subjected to control and regulation, sometimes by custom and social pressure, sometimes legal rules. A variety of reasons justify limitations on this interest. They include a concern for public health or safety, a desire to avoid specific forms of antisocial

> conduct, and an interest in protecting the beholder from unsightly displays. Nothing more than a desire to encourage respect for tradition, or for those who are moved by traditional ceremonies, may be sufficient in some situations. . . .[627]

Appearance generally does not implicate the first amendment, standing alone. Nevertheless, some may allege that specific dress or modes of appearance constitute symbolic speech and, irrespective of a due process right to dress as one pleases, it may be alleged that a restriction on this form of dress or appearance is a restriction on free expression, protected by the first amendment. But, to the extent that appearance standards are challenged as being violative of the first amendment, "[a]s conduct becomes less and less like 'pure speech' the showing of Governmental interest required for its regulation is progressively lessened."[628]

Consequently, installation standards focused on matters of attire and appearance and not expressive conduct should be sustained. On the other hand, standards which attempt to reach "symbolic speech" run the risk of being invalidated. Hence, clothing that carries on it messages that may be unpopular or distasteful in the military community cannot be prohibited. In Persons for Free Speech at SAC v. United States Air Force,[629] an order was issued not to allow any civilian to enter the installation whose clothing was "political" or "ideological."[630] Entrance to the Offutt Air Force Base open house was consequently denied to persons wearing "T-shirts" with the slogans "No Nukes in the Breadbasket" and "Jobs, Not Bombs."[631] In dicta, the Eighth Circuit observed that entry should not have been barred, although "[f]acts which might reasonably have led [the base commander] to forecast substantial disruption of or material interference with [the open house] activities" would give to him the

discretion "to deny [an individual's] form of expression."[632]

In sum, appearance standards based on articulable and legitimate concerns of the installation commander are proper. Installation facilities serve many purposes. Some, like the commissary, require attention to hygiene. Overseas facilities often are exposed to local national view which gives rise to a legitimate concern that the image of the military community reflect a character that will inspire host-nation confidence in the overseas force. Appearance standards linked to these or other reasonable concerns are appropriate.

e. Religion and the installation. The right to the free exercise of one's religion and the prohibition against Government establishment of religion mark the two areas of concern for installation managers concerning religion. The principal issues which arise in the installation context--as opposed to other contexts such as

military appearance standards[633]--are whether off-post religious groups may have access to military installations and whether those on the installation may use installation resources in the observance of their religion.

Army policy concerning religion is tied to supporting the religious needs of the military community.[634] Religious groups may not enter the installation to proselytize.[635] The Judge Advocate General has further observed that outside religious groups who do not have adherents located on the military installation to whom they wish to minister may not enter the installation.[636] Denying access to outside groups is bottomed on the rationale in Greer v. Spock[637] that the installation is not a public forum.

With respect to the free exercise of religion of those on the installation, the commander must be cautious not to create an establishment of religion,

while giving members of the military community adequate opportunity to exercise their religion.

In Lynch v. Donnelly,[638] the Supreme Court held that Pawtucket, Rhode Island, could use city funds to erect a nativity scene during the Christmas season in a park owned by a nonprofit organization. In deciding whether erection of the nativity scene was an establishment of religion, the Court observed:

> In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed. . . . In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of Government with religion. . . . But, we have repeatedly emphasized our unwillingness to be confined to

> any single test or criterion in this sensitive area.[639]

Consequently, in judging whether an installation practice constitutes an establishment of religion, judge advocates should apply the criteria mentioned by the Court with the flexibility urged in Lynch. Thus, for example, the purpose of an installation practice need not be "exclusively secular." It suffices that it has a secular purpose.[640]

Well before Lynch v. Donnelly, The Judge Advocate advised that the erection of nativity scenes, Christmas trees, menorahs and the like are permissible and "are no more violations of the establishment clause than are the existence of chapels on Army posts."[641] The Lynch holding arguably applies to the erection of nativity scenes on installations and therefore the placement of them is a matter of concern. As seen below, the constitutionality of the Army chaplaincy recently

has been upheld. Thus, the best location for any such display is on the grounds of the post chapel.

By putting a nativity scene at the chapel, its religious significance can be maintained, while not running afoul of the establishment clause. Katcoff v. Marsh[642] confirmed the constitutionality of the existence of chapels on Army posts when it held:

> Congress has provided for chaplains in an effort to allow all soldiers to worship however they choose, if they choose to do so at all. Given the obligations and restrictions imposed on those in the military, Congress may constitutionally do no less . . . . Affording an opportunity for worship without coercion preserves the religious neutrality of the Government.[643]

Consequently, religious groups can hold religious services on the installation in designated

facilities or in other appropriate areas as determined by the installation commander on the advice of the chaplain.[644] Religious groups also may make charitable solicitations incident to religious services.[645] Beyond the conduct of religious services and use of chapels and other facilities committed to religious use, installation commanders must beware of providing assistance to religious groups that would suggest an advancement of religion. One area for close scrutiny is use of other facilities, such as on-post schools, for religious education.[646] In all cases, even where assistance seems lawful, commanders must be sure not to discriminate between religious groups on the installation.[647]

A related issue is the interplay of the right to free exercise of religion and the concept of military necessity with regard to the accommodation of religious practices. DOD Dir. 1300.17 requires the services to establish guidelines and procedures in this area. In response, the Army has made it a

policy "to approve requests for the accommodation of religious practices when they will not have an adverse impact on military readiness, unit cohesion, standards, health, safety, or discipline."[648] The Army's program places most of the responsibility and almost all of the decision making power in the hands of the unit commander. If the commander denies a dress and appearance request, the soldier has an automatic right to appeal the decision up to Headquarters, Department of the Army (HQDA).[649]

The power of the military to regulate the on duty appearance of soldiers even when that regulation will offend or constrict their religious practices or beliefs was recently upheld by the Supreme Court in Goldman v. Weinberger.[650] Dr. Goldman, an ordained rabbi, serving as an Air Force captain and clinical psychologist at the mental health clinic of March Air Force Base, sued to overturn an Air Force regulation that prohibited the wear of headgear indoors except by armed security police in the

performance of their duties. Goldman had received a letter of reprimand and had been denied continuation on active duty for violating his commander's order not to wear his yarmulke while on duty.

Despite the innocuous nature of the yarmulke and the fact that Goldman worked in a hospital, the Court refused to grant him relief. Great deference was given to the "considered professional judgement of the Air Force [that] the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission."[651] Without specifying what standard of review (that is, rational basis/strict scrutiny) was being applied, the Court held that: "The Air Force has drawn the line essentially between religious apparel which is visible and that which is not and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for

uniformity. The first amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs."[652]

2-17. Control of commercial and charitable activities affecting the installation

a. Control of commercial solicitation on the installation. Control over solicitors avoids harassment of personnel on the installation, prevents them from being victimized by irresponsible or dishonest solicitors and avoids the appearance of any official endorsement or pressure by the Government. Commanding officers have discretion to permit solicitation and may issue regulations to control it so long as they avoid discriminatory provisions which would eliminate or restrict competition.[653] Solicitation here refers to sale activities directed at post personnel as opposed to

activities which provide basic services for the military installation.[654]

The solicitation by any soldier as agent for another person for the sale of any commodity to another soldier on a military reservation is prohibited.[655] Special restrictions are imposed upon solicitors selling mutual funds shares and other listed or unlisted securities.[656] The solicitation of a junior by a senior for any commodity is prohibited even though both may be off the installation, out of uniform, or off duty.[657] Solicitation may be conducted only on a personal, individual basis, by appointment, in such locations and at such hours as the post commander specifies.[658] "Door-to-door" solicitation is strictly prohibited although solicitors can reach potential customers by advertising, direct mail and telephone.[659]

Solicitors must supply certain information before being given a permit to transact business on post.[660] When required to by local policy, solicitors must

show that they meet Federal, State, county, or local licensing and regulatory requirements. The installation commander personally[661] authorizes solicitation by issuing a permit after a review of a statement of past employment.[662] Permits are good for no more than one year.[663] Solicitors must state in writing that they have read local regulations, understand them and realize that any violation or noncompliance may result in the withdrawal of the solicitation privilege for the solicitor and the solicitor's employer.[664]

The installation commander[665] can deny or revoke permission for commercial activity by a company or its representatives when it is in the best interest of the command.[666] Grounds include engaging in any prohibited practice.[667] These include solicitation of "mass" or "captive" audiences,[668] soliciting personnel on-duty,[669] soliciting without an appointment,[670] using manipulative, deceptive or fraudulent selling devices, advertising or sales literature,[671] or saying

that the Departments of Defense or Army sponsor or endorse the product.[672] The permit may also be withdrawn for personal misconduct[673] or repeated complaints concerning defective goods or the manner in which solicitations are being made.[674]

Solicitors must be given an opportunity at a hearing to "show cause" why solicitation privileges should not be suspended,[675] although privileges can be temporarily suspended for up to 30 days pending the hearing.[676] Privileges are suspended for up to two years by the installation commander.[677] The DA decides whether to suspend privileges for a longer time[678] or to suspend privileges Army-wide.[679]

Suspended solicitors face prosecution for subsequent entry on the installation.[680] In addition, the business practices of the solicitor may warrant off-limits sanctions.[681] Army policy closely controls the sale of commercial life insurance and motor vehicle liability insurance.[682] To be eligible to sell life insurance on a military installation,

agents must qualify under the laws of the surrounding State.[683] While the Army encourages acquisition of life insurance,[684] it also provides disinterested third-party counseling to ensure the suitability and soundness of the policy.[685] There are also provisions for the allotment of military pay for purchasing insurance.[686]

The provisions relative to the sale of motor vehicle liability insurance are similar. The insurer must be fully identified and policies must meet all statutory and regulatory requirements of the State.[687] The insurer must also be licensed to do business in the State where the installation is located. Where the installation is located in more than one State, the sufficiency of a particular policy in this respect will depend on the State in which the vehicle is principally garaged and used. Regulations do not authorize the sale of accident insurance by vending machines.[688] Since all military and civilian personnel must possess motor vehicle

liability insurance if required by the State in which they are assigned before acquiring driving and parking privileges on Army installations,[689] it is important that those needing insurance have access to but nevertheless also be protected from solicitors on post.

Regulation of commercial solicitation must take into account that solicitation invariably involves commercial speech: "expression related solely to the economic interests of the speaker and its audience."[690] Because the Supreme Court has recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to Government regulation and other varieties of speech,"[691] it has held that the Constitution accords lesser protection to commercial speech than other forms of expression.[692]

The content of commercial speech can be regulated because business persons can evaluate the accuracy

of their message and its legality and because "(i)n addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"[693] Hence, commercial speech that is misleading or related to unlawful activity can be barred.[694] Otherwise legitimate commercial speech can be regulated when the Government can assert a "substantial interest" in regulation.[695] The regulatory vehicle must directly advance the Governmental interest asserted and cannot be anymore extensive than is necessary to serve that interest.[696]

Commercial speech includes the "dissemination of information through group product-demonstrations"[697] and advertising generally[698] although in-person solicitation may not be similarly protected speech.[699] The actual sale of merchandise--the consummation of commercial solicitation--is not protected commercial speech.[700]

In an unreported case, United Military Association v. Alexander,[701] the Army's solicitation policy was challenged by two firms and an agent who sold insurance on Fort Eustis, Virginia. Based on a report of criminal activity by the insurance agent, the commander suspended the agent's solicitation permit for thirty days.[702] After a hearing, the agent's solicitation privilege was suspended for two years and the agent was directed not to reenter Fort Eustis or its subpost, Fort Story.[703]

The court held in response to a substantive due process attack on the Army policy that the constitutional power to make rules for the Army[704] authorized Congress to give the Secretary of the Army authority to prescribe regulations for the Army,[705] and that the solicitation policy was a lawful exercise of this regulatory power.[706] Against the charge that the policy was too burdensome when it required that business only be by specific appointment,[707] the court observed:

> The procedures established at Fort Eustis may be cumbersome, but that does not render them unconstitutional. Because of the unique function of the Armed Forces, anyone dealing with them must expect that he will not be able to conduct his affairs with the ease to which he is accustomed in civilian life.[708]

Although the agent's activities would have been protected commercial speech off the installation, the court, relying on the holding in Greer v. Spock[709] that installations are not public forums for first amendment expression, concluded that Fort Eustis was not a public forum for commercial speech because it had not relinquished its interest in regulating civilian activities on the installation as had occurred in Flower v. United States:[710]

> Indeed, the record shows that the command is very much interested in regulating commercial activities and solicitation within the fort. This being so, the plaintiffs had no constitutional right to advertise their product within the area of Fort Eustis.[711]

United Military Association thus holds that since there is no constitutional right to commercial speech on an installation, the Army may regulate such commercial activity as it permits on the installation.[712] To the extent that solicitation activities can claim any protection under the first amendment,[713] the restrictions on installation solicitation do directly advance the Government's apparent interest in minimizing interference with the primary mission of the installation and the personnel who live and work on the installation.

One additional example of commercial speech is regulation of "civilian enterprise" (CE)

publications which are installation newspapers published by private concerns whose news content is supplied by the military. These newspapers, regulated by Department of Defense (DOD) policy,[714] rely on advertisements by businesses that seek a military clientele. They are subject to military review of both their content and their advertising. The public affairs staff at the installation reviews the advertising to identify any that is "contrary to law or to DOD or AR's, or that may pose a danger or detriment to Army personnel or their families, or that interfere with the mission."[715] If the publisher refuses to delete the offending material upon request, the commander can prohibit distribution of the publication.[716] Normally, only one CE publication is authorized at an installation,[717] and "periodically, qualified commercial publishers have the chance to compete for the contract to publish [the installation's CE newspaper]."[718]

Because only one CE newspaper is authorized per installation and that authorized paper gets preferential distribution on the installation, through official channels and directly to the intended readership,[719] disputes have arisen over the limited access given to competing, but unofficial, civilian newspapers. In M.N.C. of Hinesville v. Dep't of Defense,[720] the publisher of a newspaper which had failed to be awarded the contract for the CE publication at Fort Stewart and Hunter Army Airfield alleged that its first and fifth amendment rights were abridged by the restrictions placed on its distribution and the "preferential" distribution afforded the winning bidder, as the official post newspaper. The court found that CE newspapers furthered the Government's interest in disseminating information that enhances the quality of life on a military base while imposing no costs on the taxpayers.[721] "In view of this function that a CEN

services, it is reasonable for the Army to grant it special distribution rights."[722]

In Surplus Salvage Sales, Inc. v. Cooper,[723] Saigon Sam's Surplus Salvage Sales advertised in two newspapers distributed on Camp LeJeune and the nearby Marine Air Station. Because of his suspicion that that store was purchasing stolen military equipment from Marines, the Commander of Camp LeJeune threatened to stop distribution of the LeJeune newspaper if advertisements from the store were not dropped. The advertisements were dropped. The Air Station Commander similarly effected the end of advertising by the store in the Air Station newspaper. The store obtained a preliminary injunction against the commanders' actions. The Government had a substantial interest "in preventing the theft and sale of its property as well as the loss of discipline and morale which presumably accompanies such practices"[724] but, given the protection extended to commercial speech, the "means

chosen to prevent this loss (swept) quite widely across plaintiff's First Amendment rights yet serve(d) the Government's interest only indirectly."[725] The preliminary injunction issued because the advertisements did not solicit military equipment nor would stopping the advertisements directly interfere with sales of the gear. While further illustrating the connection between commercial speech and commercial activities this case highlights the need to carefully tailor sanctions to specific unlawful practices.

b. Activities by installation personnel and organizations for profit. Persons with a connection to the installation and private organizations on post stand in a somewhat different light than commercial solicitors generally. Private organizations may conduct occasional and continuing resale activities of the installation with the commander's approval.[726] The restrictions otherwise applicable to solicitors do not apply.

Consequently, door to door solicitation is permissible, subject to local regulation. Individuals who live in Government quarters also have greater freedom to conduct business although it is limited to "normal home enterprises, providing State and local laws are complied with."[727] This activity requires the installation commander's approval, although Army policy as of 1984 was to liberally approve such activities,[728] at least in the United States[729] because home businesses "have appealed to more and more military wives" and because spouse income has become "a recognized, important, and needed portion of the family income."[730] "Normal home enterprises" are defined as "those commercial activities normally engaged in by individuals in civilian society in a domestic setting" such as "sales of cookware, jewelry, cosmetics, and home and personal cleaning products."[731] Personnel on the installation engaged in other forms of commercial activity are subject to

the same restrictions as apply to commercial solicitors generally. Moreover, they remain subject to the additional standards of conduct applicable to soldiers and Army employees.[732]

c. Charitable solicitation and installation support for charitable causes. Charitable solicitation falls into two categories: on-duty solicitations and off-duty solicitations. Army policy, consistent with Government policy, is that "each military member and civilian employee of the Army will be given the opportunity, through on-the-job solicitations, to contribute voluntarily to recognized health and welfare agencies."[733] This is the Combined Federal Campaign whose intent is to limit on-the-job solicitation to one annual campaign by combining individual appeals "into a single joint campaign of eligible health and welfare organizations."[734] There are three major issues that arise in connection with the Combined Federal Campaign. The first two, selection of agencies to

participate in the Campaign[735] and how Campaign fund will be distributed to agencies which do participate,[736] do not concern the installation. The third issue is the elimination of practices that involve "compulsion, coercion, or reprisal" because of the size of a contribution or because of a failure to participate.[737]

While on-duty solicitations are generally limited to the Combined Federal Campaign, "solicitations conducted by organizations composed of civilian employees or members of the armed forces among their own members for organizational support or for benefit or welfare funds for their members"[738] may be conducted outside the aegis of the Government-wide effort. These "internal welfare solicitations,"[739] restricted only to the extent that they not conflict with the major campaign, include Army Emergency Relief[740] and solicitations by on-post private organizations for installation welfare and recreational activities.[741]

"Voluntary agencies," as defined by Federal policy,[742] can forego participation in the on-duty campaign[743] and solicit off-duty in family housing areas[744] and "at entrances or in concourses or lobbies of Federal . . . installations normally open to the general public."[745] Although service personnel may not participate in off-duty family quarters solicitations in their official capacity,[746] they may do so in their private capacity.[747]

Religious organizations and their affiliates, qualifying as voluntary agencies, can participate in the Combined Federal Campaign or, foregoing participation, may solicit off duty to the same extent as other voluntary agencies.[748] Other fund raising by religious groups is limited to religious services.[749]

These rules concern solicitation activities targeted at the installation population. Independent of these activities, limited official support for other local charitable activities is

authorized. Generally, "support to fund-raising events or projects for a single cause" is inconsistent with the policy to limit solicitation targeted at the installation population to one major campaign.[750] Nevertheless, overseas commanders may permit on-duty participation in sports competitions off-post "in the support of local or indigenous fund-raising efforts."[751] Commanders generally can provide off-post support for fund-raising programs for the local community which are supported by local united, federated, or joint campaign officials, or when the commander decides that "support of a purely local charitable drive is part of the responsible role of the military installation in the local community."[752] Examples are support of local volunteer fire departments, rescue units, or "youth activity fund drives."[753]

d. Restricting access to off-post businesses. When a commander declares a place off-limits, military personnel are prohibited from any contact

with the place for so long as it remains off-limits.[754] Off-limits sanctions may be used "to help maintain good discipline and an appropriate level of good health, morale, safety, morals, and welfare of Armed Forces personnel."[755] Sanctions may also be applied to insulate service personnel from "crime conducive conditions or from becoming the victims of crimes."[756] Specific areas of concern include but are not limited to prostitution, racial and other discriminatory practices, alcohol and drug abuse, unfair commercial practices, or other undesirable conditions.[757] An undesirable condition could include, for example, local unattended swimming areas at which a high risk of drowning exists.

Installation commanders may establish Armed Forces Disciplinary Control Boards (AFDCB) to advise them concerning crime and other conditions inimical to the command and to provide liaison and coordination between area commands and the civilian community.[758] Where there are several installations

of different services in the area, a single AFDCB may act for the area under the control of the commander of the largest number of troops.[759] Elements from the civilian community can observe and testify at board proceedings but cannot have a vote.[760]

In emergency situations, commanders can immediately declare an establishment off-limits and follow AFDCB procedures after the declaration is made.[761] In other cases, installation commanders will attempt to correct adverse conditions or situations through contact with local civilian leaders.[762] Where this is unsuccessful, the AFDCB serves written notice on the individual or establishment responsible, offering the opportunity to cure the situation.[763] Where no curative action is taken, the respondent individual or establishment is offered the opportunity to appear before the AFDCB, with or without counsel, to refute the allegations.[764]

When, upon further investigation, no curative action is taken, the AFDCB recommends off-limits action to the sponsoring commander, who will approve or disapprove the recommendation after other installation commanders in the area have had ten days to object to the recommendation.[765] The president of the AFDCB makes the off-limits declaration that is for an unspecified time.[766]

Military authorities cannot place off-limits signs on private property;[767] nor can military law enforcement personnel routinely visit off-limits premises.[768]

Off-limits sanctions can be removed at any time upon an appeal to the AFDCB and sponsoring commander, or to the next superior commander where a local appeal is unsuccessful.[769] Sanctions also can be withdrawn on the recommendation of the AFDCB, based on inspections of off-limits establishments conducted at least quarterly.[770]

Challenges to off-limits sanctions have focused on the adequacy of due process. In Ainsworth v. Barn Ballroom Co.,[771] a dance hall in Newport News, Virginia, was placed off-limits and military police were stationed outside the establishment. The court held that the off-limits order "was restricted to military personnel; that it did not by its terms deprive appellee of the right to maintain its dance hall, or prevent its civilian customers from patronizing it."[772] The court concluded: "And if, in consequence, appellee's business sustained a loss, it was neither a "taking" of appellee's property, nor a trespass, nor an unwarrantable interference."[773]

To the extent that an establishment can claim a property or liberty interest entitling it to due process,[774] the AFDCB procedures grant substantial process. A command risks court intervention when procedures are not strictly followed or where notice to respondents is inadequate; thereafter, the

command should attempt to argue that its off-limits determination is not reviewable.[775]

In overseas commands, "reverse" off-limits may be a problem where establishments refuse to deal with American soldiers or particular classes of American military personnel. Criminal charges were brought against the owner of a German discotheque for refusing to admit an Army officer and another black friend not affiliated with the United States forces.[776] The owner refused to admit the two based on an off-limits policy directed against members of the American forces and blacks. Reversing on other grounds, the Bavarian Supreme Court sustained the lower court's determination that the refusal constituted a criminal insult under German law.[777]

2-18. Post privileges and services

a. Regulation of motor vehicles. The post commander's control over operation of privately

owned vehicles extends to registration of vehicles, traffic control, and regulation of installation driving privileges.[778]

(1) Registration. The installation commander must require registration of motor vehicles owned and operated by personnel quartered or employed on or making regular visits to the installation.[779] The registration system must be uniform and contain certain basic requirements. Vehicle owners must have liability insurance coverage not lower than that required by the surrounding State; adequate proof of ownership and State registration, a valid State driver's license, and evidence of a safety and mechanical inspection if required by local, State or military jurisdiction.[780] The commanding officer may impose additional requirements reasonably related to military interests like prohibiting a particular class of vehicles or requiring safety devices.[781]

The installation commander can terminate the registration of a privately owned vehicle when the

owner sells the vehicle or the owner is transferred or separated.[782] Where the registrant's State or installation driving privileges are revoked, registration may continue where State law permits for the benefit of dependents; registration also may continue where the registrant departs but dependents remain on or near the installation.[783] All decals are removed when the installation registration is terminated.

(2) Driving privileges. Reasonableness is also the test of a post commander's actions in preventing a person, or class of persons, from driving on the installation. Unless there is some legitimate interest to be served, for example, a commander would find it difficult to prohibit all enlisted soldiers below a certain age from driving on the post although clearly persons whose past conduct has shown them to be unfit to operate a motor vehicle can be denied post driving privileges.

The traffic point system adopted by the Army[784] provides an impartial and uniform administrative device to regulate driving privileges. Points are assessed against the driving record of personnel for violations on and off installations.[785] As these points accumulate, counseling and remedial driver training may be recommended; when these measures fail or an individual is a consistent offender, installation operating privileges may be suspended.[786] Permanent revocation for a specific period, not less than six months, applies to serious moving violations, where lesser corrective action fails, where a large number of points have accumulated, or where the preconditions for post driving privileges are not met.[787] Mandatory revocation for one year is reserved for drunk driving and serious offenses.[788]

Personnel are entitled to written notice of the intended action and an administrative hearing.[789] But when a State authority suspends or revokes an individual's driver's license, the installation

driving privilege is automatically terminated.[790] Different rules apply to drunk driving. Immediate suspension follows review of the best readily available evidence of an incident of drunk driving wherever committed.[791] Individuals can request a hearing to have privileges temporarily restored.[792] Revocation for one year, dating from the original suspension, follows conviction or other finding that confirms the charge or a finding that a test to measure alcohol in the blood was refused or not completed.[793] For military personnel, dependent upon rank, a general officer letter of reprimand may be required in drunk driving cases.[794]

(3) Supervision and enforcement. The installation commander will develop installation traffic codes.[795] These regulations are binding on military personnel under the Uniform Code of Military Justice. Civilian employees are subject to disciplinary action.[796] The casual civilian motorist coming on a military post may be subject to Federal

or State prosecution if a State traffic law applies to the offense. This jurisdiction may be direct, in the case of a concurrent jurisdiction or proprietorial interest installation, or indirect, in the case of an exclusive or concurrent jurisdiction post by virtue of the Assimilative Crimes Act. In addition to or in place of prosecution, violators can be barred from the installation.

b. Government quarters. The post commander is responsible for assignments to quarters, termination of quarters, lease of quarters, and other related functions, such as inspections to ensure that common standards of adequacy are met.[797]

(1) Housing assignments. Military necessity takes precedence over other considerations in assignment of housing. Thus, "key and essential personnel," military and civilian personnel who serve in specific positions that require their availability on post after normal working hours, have priority in assignment of family housing.[798] To

maintain maximum occupancy, the post commander may involuntarily assign new personnel to post quarters,[799] except when extreme hardship will result or other criteria are met.[800] Declining available quarters when offered results in a loss of the basic allowance for quarters as long as adequate quarters remain vacant.[801] However, personnel will not be involuntarily assigned to substandard housing except when the installation commander determines that military necessity requires.[802]

The installation commander will also maintain maximum occupancy in housing for unaccompanied personnel.[803] Married personnel whose families are not with them may occupy bachelor quarters.[804] Personnel can be involuntarily assigned to available quarters unless assignment would cause financial hardship.[805] Overseas quarters also may be assigned to permanently assigned civilian employees, including nonappropriated fund employees.[806] Quarters generally can be assigned to civilian employees who,

due to military necessity, must live on post,[807] American Red Cross personnel on duty with the Army,[808] technical representatives or contractor personnel,[809] and some foreign military personnel.[810] Civilians in these categories must pay rent when occupying quarters in the United States.[811] When adequate bachelor quarters are not available, personnel are authorized to live off-post and receive the basic allowance for quarters, although soldiers in grade E-6 or below remain subject to later involuntary assignment.[812]

(2) Termination of assignments. Entitlement to family quarters in kind terminates when family members no longer reside permanently with the sponsor, as where there is a divorce.[813] Likewise, when a soldier acquires a family member who will reside with the soldier, the unaccompanied quarters assignment terminates.[814] Regardless of the reason for termination, 30 days written notice to vacate is generally required.[815]

Most reasons for termination turn on a change of occupant status or circumstances beyond the occupant's control. Quarters assignments also may be terminated at the discretion of the installation commander for misconduct of the sponsor,[816] or for misuse or illegal use of quarters or other misconduct contrary to safety, health, and morals by the occupants,[817] or, in the case of unaccompanied housing, where the soldier fails to maintain the quarters according to health, safety, and fire prevention requirements.[818] Acts of misconduct unrelated to the maintenance of law and order on the post, however, are not within the scope of the regulations.[819] Thus, a traffic accident committed by a family member or military personnel off-post, even though appearing to be misconduct contrary to safety, should not result in termination of quarters.

Although notice is required before termination of family housing and notice, at least for civilians,

is required before termination of unaccompanied housing, no additional due process is afforded. In Hines v. Seaman,[820] an Air Force sergeant and his family were ordered out of public housing at Hanscom Air Force Base in 1969, based on an Air Force regulation substantially similar to the current Army regulatory scheme.[821] Sergeant Hines argued that he was entitled to due process before termination.

The court held that Hines was not a tenant, but only a licensee.[822] Concluding that "Army housing and like privileges and perquisites in the military establishment are bounties, acts of grace, and areas of discretion,"[823] the court held that there was no entitlement to due process. To the extent that the decision focuses on the housing entitlement as a privilege rather than a right, the analysis incorrectly applied constitutional doctrine that by 1969 had already rejected distinctions between rights and privileges as determinative of constitutional issues.[824] In a challenge to a housing

termination today, analysis would turn on whether an occupant has a property interest or liberty interest in Army housing.[825] Hines v. Seaman does not clearly define the housing entitlement in either category.

In Engblom v. Carey,[826] National Guard personnel evicted striking New York prison guards from State-supplied housing assigned the guards under State regulations. While holding that due process was not denied the striking guards in the circumstances, the Second Circuit concluded that a property interest arose from the occupancy and use of the rooms given the guards by the State regulations. Although the housing scheme in Engblom v. Carey appears to be analogous to the military housing scheme,[827] a significant difference is that termination of quarters entitles soldiers to the basic allowance for quarters.[828] Hence, to the extent one might argue the existence of a property interest in assigned quarters,[829] termination does not deprive the occupant of property since the allowance paid in lieu of the

quarters allows the occupant to seek quarters equal in value. Because there is no deprivation and, consequently, no injury, there is no requirement for due process.

Because civilians overseas also become entitled to a housing allowance when required to live on the economy, the same argument applies to them. Civilian employees in the United States and other civilians anywhere who occupy Government quarters are renters. Consequently, they stand in no greater relationship to the United States than tenant to landlord.

An individual no longer entitled to occupy Government quarters becomes a trespasser on Government property.[830] The Army prefers peaceful recovery of unlawfully occupied quarters to forcible eviction.[831] The Department of Justice prosecutes actions against individuals who hold over in Government quarters or who disobey an eviction order.[832]

c. Health services.

(1) Eligibility. Active duty personnel are entitled to medical and dental care in any facility of any uniformed service.[833] Retired personnel and dependents of living or deceased retirees or of serving or deceased active duty personnel are eligible "subject to the availability of space and facilities and the capabilities of the medical and dental staff."[834] The medical or dental officer in charge makes the conclusive determination as to the availability of space and facilities and capabilities of the medical or dental staff.[835] Dental care is not authorized for family members except where adequate civilian facilities are unavailable.[836] Civilian employees outside the United States and at remote domestic installations may receive the same care as military personnel and family members, although only work-related care is otherwise authorized for them.[837] Medical care

includes emergency medical services to the extent it is provided.[838]

(2) Withholding medical and dental care. The statutory scheme authorizing medical and dental care does not expressly provide for withholding medical care except when, in the judgment of the officer in charge, space, facilities, or staff are inadequate. Although "a dependent could be denied medical care, entitlement to which was derived from statute, only on the basis of a narrow and strict construction of the qualifications to this entitlement expressly set forth in the statute,"[839] The Judge Advocate General has suggested that access to medical facilities may be withheld where the basis for barring access is misconduct "related to the use of these facilities."[840] Where a family member or retiree commits some misconduct in a medical or dental facility, therefore, the commander of the medical or dental treatment facility can, in accord with the authority provided in the statutory scheme,

determine that space, facilities, or staff are inadequate to provide care for the individual.[841] Writing false prescriptions and presenting them at a military medical facility, for example, clearly inhibits the ability of the facility to dispense drugs for needed treatment to both the individual who presents the false prescription and to all who rely on the facility. Where a patient refuses to accept total care, such as refusing blood transfusions because of religious belief, access to the facility can be denied.[842]

(3) Inquests and autopsies. When a death occurs on an installation, the commanding officer is required to appoint a summary court-martial to investigate the circumstances attending the death.[843] Military authorities have no jurisdiction to conduct inquests into deaths of civilians occurring in areas subject only to State law. The coroner of the county in which the dead body of a soldier is found is not prohibited by Federal law from

conducting the inquest required by State law. In cases where the military commander is not authorized to conduct an inquest, an administrative investigation into the facts and circumstances can still proceed.[844]

The commander of a medical treatment facility may authorize autopsies to be performed on soldiers who die while serving on active duty or active duty for training when necessary to protect the welfare of the military community, to determine the true cause of death, or to secure information for the completion of military records. When death occurs while the member is serving as an aircrew member in a military aircraft, an autopsy is mandatory.[845] In oversea areas where local laws and regulations require an autopsy, and the United States has not been exempted from such laws or regulations by treaty or agreement, the commander will order an autopsy performed without the consent of the spouse or next of kin. Consent from the spouse or next of

kin of others who die on installations must be obtained before an autopsy is performed unless the autopsy is authorized or required by applicable State or local law.[846] In all other cases when an individual dies outside a military installation and is dead on arrival at an Army medical treatment facility, the authority for autopsy is governed by applicable local laws.[847]

(4) Consent to treatment of nonmilitary personnel in Army hospitals. Medical care for nonmilitary persons is contingent on (1) the person's consent, (2) the consent of another authorized to consent for the person in accordance with local law, or (3) the order of a court having jurisdiction over both the individual and the facility concerned.[848] The consent may be implied from the actions of the patient or other circumstances, even though specific words of consent are not used.[849] State law controls whether a person is capable of consenting to medical procedures.[850] If

there is a question whether the consent of a parent or guardian is required in view of the age, mental condition, or emancipated status of the patient, or because of the nonavailability of the parents, or similar factors, medical personnel are directed to seek the advice of a judge advocate.[851] State law also controls the sufficiency of consent by a minor. Where there is no State law, the sufficiency of consent should be judged on the maturity of the child.[852] Parental consent is required only when the minor's consent, standing alone, is legally insufficient.[853] Next-of-kin consent is required whenever patients cannot respond for themselves.[854]

Where there has been a judicial determination of mental incompetency, the consent to treatment must be obtained from the individual appointed by the court to act for the incompetent patient.[855] Even without an appropriate court order, or the consent of patients or a person authorized to act on their behalf, the commander of an Army medical facility

may temporarily detain nonmilitary individuals with a psychiatric disorder that make them dangerous to themselves or to others.[856] The temporary involuntary detention of a nonmilitary individual should conform with local law and statutes governing involuntary detention, particularly where the United States does not possess exclusive jurisdiction.[857] The validity of a court order directing involuntary confinement or treatment of a patient in any Army medical treatment facility should be reviewed by a judge advocate.[858]

d. Control of access to post services. Military personnel, family members, and, in some respects, civilian employees and nonaffiliated civilians have access to post services like the exchange and other nonappropriated fund activities, the commissary, and morale, welfare, and recreation activities.[859] When misconduct occurs in some of these facilities, the regulation governing the specific facility provides for an appropriate response by the installation

commander.[860] Generally, however, the Army has consolidated its policy concerning regulation of post privileges.[861]

Installation commanders will designate one person who is not assigned to any law enforcement activity to review reports of abuse of post privileges and take action against offenders.[862] A warning letter may issue on a first offense unless the incident involves shoplifting, in which case suspension for a minimum of six months is appropriate.[863] A third incident or evidence of "a chronic attitude of personal and financial irresponsibility" may result in indefinite suspension.[864] Identification cards may be confiscated and overstamped for abuse of privileges in Army facilities.[865] Suspension from use of one facility does not warrant suspension at others.[866] Suspensions can be limited to one installation or to the same type of facility at all installations.[867]

Patrons who have abused a privilege will be given a chance to present evidence in their behalf and to appeal suspensions in writing.[868] Army policy appears to contemplate a single opportunity for the individual to be heard after suspension has occurred.[869] Indefinite suspensions should be reviewed annually to decide whether to reinstate privileges.[870]

e. Administrative response to misconduct generally. Administrative sanctions protect installation facilities in particular and the installation generally. Army regulations prescribe appropriate responses to misconduct related to specific types of privileges and services. In some cases, the commander has a nondelegable duty to act. In others, a designated representative can act. Installations should consider consolidating the authority to recommend installation commander action and the authority to directly take action in one person or an adjudicatory body.[871] Persons who engage

in misconduct can be diverted to this noncriminal channel which can quickly and effectively influence offenders to alter their behavior.

2-19. Law enforcement

a. Law enforcement personnel and the power to apprehend. Installation commanders are responsible for the maintenance of law and order on their installations, including the investigation of offenses and incidents.[872] Military commanders have inherent authority and responsibility to maintain order, security and discipline necessary to assure the proper functioning of their command.[873] The execution of this responsibility, vis-a-vis civilians who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations, may result in a civilian's ejection, citation to a United States Magistrate Court, or

temporary restraint by military police pending expeditious transfer to appropriate civil authorities.[874]

Pursuant to article 7(b), Uniform Code of Military Justice, military police are empowered to apprehend soldiers under the authority of regulations for any violation of the Code.

However, Congress has not granted any statutory authority to arrest civilian lawbreakers.[875] Unlike Federal law enforcement officials such as United States marshals and Federal Bureau of Investigation agents, military personnel are not peace officers or a part of the Federal Protective Service.

Although there is no express authority for military police to apprehend civilians who commit offenses on the installation, The Judge Advocate General has concluded that the commander's inherent authority to protect the installation permits the apprehension of civilians.[876] Independent of the commander's inherent authority, apprehension power

has been inferred by the courts from the Federal trespass statute[877] and from article 9, Uniform Code of Military Justice. In United States v. Banks,[878] Air Force investigators apprehended a civilian in a barracks room at McChord Air Force Base. The civilian's Federal narcotics conviction was affirmed, the court concluding:

> When their actions are based on probable cause, military personnel are authorized by statute to arrest and detain civilians for on-base violations of civil law, see 10 U.S.C. ✍809(e) and 18 U.S.C. ✍1382; also, they may conduct reasonable searches based on a valid warrant. . . . The power to maintain order, security, and discipline on a military reservation is necessary to military operation. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). Thus, Banks was properly searched and detained. . . .[879]

The Ninth Circuit relied on the Federal trespass statute and article 9, Uniform Code of Military Justice, without stating how they apply. Reliance on the trespass statute is well-founded. Section 1382, providing for the prosecution of persons found on an installation "after having been removed therefrom," implies authority to seize offenders and eject them from the installation. The applicability of article 9 is less clear. Article 9 defines arrest and confinement which are terms of art in military criminal law, distinguished from apprehension.[880] Article 9(e) provides that "[n]othing in this article [article 9] limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified." The Ninth Circuit apparently concluded that article 9(e) is an independent grant of apprehension authority, rather than simply a reference to the

power to apprehend described in article 7, which only authorizes apprehensions of military personnel. The rest of article 9 and article 7 support a limited authority to apprehend and detain civilians although this authority will not support peacetime apprehensions wherever made or wartime apprehensions in the United States.[881]

In addition to having status as members of the military service, soldiers are private citizens. The Posse Comitatus Act[882] does not prevent the performance of law enforcement activities in their private capacities. Thus, an enlisted soldier may accept off-duty employment as city fire chief, fire marshal, or assistant police chief of a municipality near his assigned station without violating the "Posse Comitatus" Act.

Unlike United States marshals who can arrest without warrant for Federal offenses,[883] agents of the Federal Bureau of Investigation who have similar authority,[884] and uniformed guards of the General

Services Administration who have the same powers as sheriffs and constables for law enforcement purposes,[885] special guards and policemen employed by the military departments do not have statutory apprehension authority, although they may carry firearms.[886] In the absence of a statute limiting a Federal officer's power to arrest without warrant, he or she has the same arrest powers as a private citizen.[887] In Ward v. United States,[888] a postal inspector arrested a railroad employee in California on probable cause that the employee had stolen from the mails. No Federal law at the time authorized postal inspectors to make arrests. However, the arrest and incidental search were upheld under the "citizen's arrest" principle in California law, although the court also held that California law relating to "peace officers" did not apply Federal officials.[889]

As to parts of military reservations not under exclusive jurisdiction, civilian guards can be

deputized by local law enforcement officials although the creation of a dual status raises the problem of divided authority.[890] But no Federal law prohibits such action and, if authorized by the law of the particular State involved, it is permissible.[891]

Irrespective of other authority, civilian law enforcement officers have the same authority to apprehend incident to the commander's inherent authority as do military policemen. Whether and to what extent a particular civilian employee can detain a civilian depends on the employee's job classification and description. Employees are classified in either the Police Series, GS-083, or the Guard Series, GS-085. Police officers are characterized as having the authority to apprehend without warrant for offenses committed in their presence and felonies when they have reasonable grounds to believe that an offense has been committed.[892] Guards are primarily employed to

protect Government property.[893] The authority of guards to apprehend and detain is more limited than police officers:

> The arrest authority possessed by most guards is that of the private citizen. To effect an arrest, the guard detains the violator and calls upon a policeman for assistance. Guards enforce Federal laws and administrative rules, and regulations. . . .[894]

Based on this job classification, guards have at least the authority to apprehend as that term is understood in military law--that is, the power to take into custody. Hence, guard employees are no less able than police employees in dealing with criminal offenders. The same authority can be exercised by guard personnel employed by contractors so long as the exercise of apprehension authority is a part of the contract; all personnel involved in

law enforcement or security duties are entitled to use force in the performance of their duties.[895]

A post commander is not authorized to employ civilian guards and special policemen for duties which are not reasonably necessary to the accomplishment of the commander's mission. For example, where State authorities request that civilian employees be used to seize suspended or revoked drivers licenses of soldiers, post commanders should not comply as the request is not reasonably related to their mission.

b. Inspections and searches at military installations.

(1) Inspections. "The commander has the inherent responsibility and power to conduct inspections of personnel and property within his control."[896] An inspection determines and ensures "the security, military fitness or good order and discipline" of an installation.[897] An inspection, unlike a search, is not based on particularized

suspicion. The principal type of installation inspection is the gate inspection.

Civilians entering an installation should not be inspected over their objection but should be denied access to the installation.[898] Military personnel have no choice.[899] All persons are subject to exit inspection over their objection.[900] The installation commander will issue specific and complete written instructions which detail the times, locations, and methods of inspections.[901] Army policy requires that:

> All persons entering installations must be advised in advance (by a sign prominently displayed, See AR 420-70 and AR 380-20) that they are liable to search upon entry, while within the confines of the installation, and upon departure therefrom. Such information may also be printed on a visitor's pass or card.[902]

(2) Searches. Searches may be conducted when they are incident to a lawful apprehension,[903] when there has been a voluntary consent to search,[904] or when based upon probable cause.[905] Federal courts have delineated broad search authority for military commanders in prosecutions of civilians based on evidence obtained during installation searches. The cases, relying on several different theories, are bottomed on the principle that military necessity requires flexibility in the application of the fourth amendment to military searches, at least of civilians.

Implied consent has been one theory successfully used. In United States v. Ellis,[906] a naval investigator asked a civilian whom he apparently suspected of narcotics trafficking whether he would consent to a search of his car. When the suspect hesitated, the agent asked if the car was on the base under a visitor's pass and whether the suspect had read the pass, which provided for search at any

time. The suspect replied affirmatively to both questions. A subsequent search yielded marijuana and led to another productive search elsewhere. The court sustained the search based on the consent inferred from acceptance of the vehicle pass:

> A base commander may summarily exclude all civilians from the area of his command. Greer v. Spock, 424 U.S. 828 (1976). It is within his authority, therefore, also to place restrictions on the right of access to a base. Here, subjecting one's person and vehicle to search upon request was such a proper restriction. . . .
>
> . . . Gaskamp Stated that he read the pass. He complied with its written requirement of display on his windshield. His decision to enter the base subject to the possibility of a search can in no way be considered coerced. To

> the contrary, the consent was knowing and voluntary and could have left Gaskamp with no reasonable expectation of privacy in his vehicle. . . .[907]

Ellis also relied on the theory that the on-base search was justifiable on the same basis as a border inspection. Underlying the result is a paramount concern with the military mission.

In United States v. Burrow,[908] a warrantless probable cause search at Fort Meade was upheld on the ground that a search on a military installation, based on probable cause, is reasonable and therefore lawful even though the requirement of a warrant based on oath or affirmation is not met. Observing that "those who enter upon a military installation, reservation, surrender some of their individual rights so that military discipline and security may remain inviolate,"[909] the court held that the

reasonableness of intrusions depends on several factors:

> Included among these factors are considerations such as the nature of the military installation, the competing interests of the individual on the one hand and that of the military on the other, and the specific nature of the method utilized by the commander in so affecting another's constitutional rights. . . .[910]

Burrow concludes that on a closed base, "civilians are subject to a warrantless search without consent and even in the absence of probable cause,"[911] because the "public or national interest" outweighs individual rights. But, where an installation is open, "civilians are not subject to a general warrantless search in those situations not evidencing a particular need for security,

discipline and order or characterized by peculiarly exigent circumstances."[912] The commander's interest in maintenance of security, order, and discipline at Fort Meade justified issuing a verbal search authorization.

The cases suggest that where particularized suspicion leads to an official intrusion, entry on an installation where posted signs condition entry on consent to search makes a search lawful either on a border-search theory or on an implied-consent theory. Independent of these bases, the peculiar nature of the military installation renders searches of civilians lawful although no other ground may support them.

c. Criminal law. State criminal law applies on lands in which the United States has only a proprietorial interest, on concurrent jurisdiction lands, and lands under partial jurisdiction to the extent that there is a reservation of State authority. Federal criminal law applicable to

military installations falls into three categories: criminal laws enforceable only in areas of exclusive or concurrent jurisdiction, criminal laws enforceable on any place under Federal control, and criminal laws enforceable regardless of where the offense is committed. Several Federal crimes, such as Federal trespass and entry onto restricted areas are discussed in paragraph 2-15. The other significant criminal laws affecting the installation are discussed here.

Title 18, United States Code, contains a number of offenses punishable when committed in the "special maritime and territorial jurisdiction of the United States," which includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the Legislature of the

State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.[913]

"[A]ny place . . . acquired . . . by consent of the legislature of the State . . . for . . . a fort . . . or other needful building" is a place over which the United States has exclusive jurisdiction, acquired through the "consent" method. Although jurisdiction has been exercised under this statute over an extraterritorial offense committed at a United States embassy,[914] this section principally applies only to offenses committed domestically on exclusive or concurrent jurisdiction areas. "Concurrent jurisdiction" logically refers to concurrent jurisdiction as to criminal law, otherwise where the State has ceded only partial jurisdiction to the Federal Government by which it can enforce its

criminal laws, the Federal courts would have no jurisdiction over such offenses.

The courts have uniformly confused legislative jurisdiction with Federal control over property, with the result that courts typically only inquire whether the United States has "practical usage and dominion over" the property concerned.[915] They also freely take judicial notice of territorial jurisdiction whether or not they understand the distinction between control of property and legislative jurisdiction over it.[916]

In 1984, the Court of Military Appeals in United States v. Williams[917] declined to take judicial notice of legislative jurisdiction over Fort Hood, which was the basis for a charge of kidnapping,[918] and was skeptical that even a trial judge at the scene could find under the Military Rules of Evidence that the jurisdictional status of the post was "either (1) generally known universally, locally or in the area pertinent to the event or (2) capable of accurate

and ready determination by resort to sources whose accuracy cannot be reasonably questioned."[919]

Apparently concluding that legislative jurisdiction is an adjudicative fact, the court held that at least in a court-martial or a charge based on the special territorial jurisdiction of the United States, the fact finder must independently have the opportunity to consider whether the offense was committed within the special territorial jurisdiction of the United States. Because of the similarity between the Military Rules of Evidence and the Federal Rules of Evidence, the court's conclusion logically extends to proceedings against civilians in Federal district courts. Notwithstanding Williams, the Fifth Circuit held in 1981 that a trial court could take judicial notice of legislative jurisdiction over Fort Benning as a "legislative fact," obviating the need for an instruction to the jury that it could disregard the court's finding.[920]

Title 18, United States Code, enumerates the major common law crimes punishable when committed in the special territorial jurisdiction of the United States.[921] Complementing the major enumerated offenses in Title 18 is the Assimilative Crimes Act:

> (a) Whoever within or upon [areas under exclusive or concurrent jurisdiction] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
>
> (b) For purposes of subsection (a) of this section, that which may or shall be imposed

> through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.[922]

Section (a) of the Assimilative Crimes Act adopts State criminal law as Federal criminal law and provides a comprehensive Federal criminal code for military installations:

> . . . The overwhelming majority of offenses committed by civilians on areas under the exclusive criminal jurisdiction of the United States are petty misdemeanors (e.g., traffic

> violations, drunkenness). Since these are not defined by Federal statutory law, and since the authority to define them by regulations is limited to a few Federal administrators, their commission usually can be punished only under the Assimilative Crimes Act. The act also has been invoked to cover a number of serious offenses defined by State, but not Federal law. . . .[923]

Prosecutions under the statute are not to enforce State law, but to enforce Federal criminal law whose details have been adopted from State law by reference.[924] There is some authority that State common law offenses are assimilated along with statutory offenses.[925] In United States v. Sharpnack,[926] the Supreme Court held that assimilation of State criminal laws as Federal law is not an unconstitutional delegation of legislative authority. Generally, the Assimilative Crimes Act

does not adopt procedural law, such as statutes of limitations[927] or laws relating to sufficiency of indictments.[928] In 1988, the Act was amended to add section (b); it authorizes Federal judges to impose administrative sanctions under State law for offenses involving the operation of a motor vehicle under the influence of drugs or alcohol.

The Act operates only where there is no Federal statute defining a certain offense or providing for its punishment or Federal law or policy allowing the conduct.[929] Furthermore, when an offense has been defined and prohibited by Federal law, the Assimilative Crimes Act cannot be applied to redefine and enlarge or narrow the scope of the Federal offense.[930] In Williams v. United States[931] the Supreme Court considered a situation where the State "statutory rape" law made 18 the age of consent, whereas a Federal statute applying within the area defined the crime of "carnal knowledge" and made 16 the age of consent. A prosecution under the

Assimilative Crimes Act was instituted on the basis of defendant's having had intercourse with a female under 18 but over 16. In holding the Act did not adopt the provisions of State law under the circumstances, the Court stated:

> We hold that the Assimilative Crimes Act does not make the Arizona statute applicable in the present case because (1) the precise acts upon which the conviction depends have been made penal by the laws of Congress defining adultery and (2) the offense known to Arizona as that of "statutory rape" has been defined and prohibited by the Federal Criminal Code, and is not to be redefined and enlarged by application to it of the Assimilative Crimes Act. The Fact that the definition of this offense as enacted by Congress results in a narrower scope for the offense than that given to it by the State, does not mean that the congressional definition

must give way to the State definition. . . . The interesting legislative history of the Assimilative Crimes Act discloses nothing to indicate that, after Congress has once defined a penal offense, it has authorized such definition to be enlarged by the application to it of a State's definition of it. It has not even been suggested that a conflicting State definition could give a narrower scope to the offense than that given to it by Congress. We believe that, similarly, a conflicting State definition does not enlarge the scope of the offense defined by Congress. The Assimilative Crimes Act has a natural place to fill through its supplementation of the Federal Criminal Code, without giving it the added effect of modifying or repealing existing provisions of the Federal Code.[932]

Some State criminal laws cannot be assimilated because of some limitation in language or objective.[933] Sometimes it is obvious that the State law cannot be applied. For example, a law making unlawful the defacing of State buildings and property cannot be assimilated. A large number of State laws provide for offenses occurring upon a "public highway." This makes uncertain whether roads within military reservations are public in nature and "of" or "in" the State. In United States v. Kiliz[934] a Washington State law punishing driving without a license on a "public highway of this State" was successfully assimilated on Puget Sound Naval Shipyard despite the limiting statutory language. The fact that the road was publicly maintained, albeit by the United States, and that the "general body" of the people at the shipyard and some members of the public had a "general right to use the roadways, subject to reasonable restrictions and regulations" brought the shipyard roads under

the statutory term "public highway."[935] Moreover, the court read the intent of the Assimilative Crimes Act "to provide the same protections to those inside a Federal enclave that a State's criminal code gives to those within the jurisdiction of the State" to underscore its result in the case.[936]

Some State criminal statutes require implementing administrative or regulatory action by State officials to be fully effective. For example, punishment for running a stop sign or a traffic light may be contingent on the traffic signal's having been posted by a State agency or official. The Judge Advocate General has concluded that a State traffic law can be assimilated even though traffic signals are erected by a local commander rather than a local official designated by statute on the theory that the posting of the signs is ministerial rather than legislative.[937] Contrariwise, if a State law authorizes a State highway commission or other regulatory body to establish traffic

regulations violation of which would be criminal, and the commission establishes an implementing regulation, this delegation of legislative power may be suspect.[938] An example would be a State law authorizing an administrative body to fix a speed limit that varies from the statutory speed limit.

This distinction between the adoption of ministerial acts but not legislative acts of an administrative official has not been authoritatively settled. Support for a broader interpretation is provided in United States v. Church,[939] where one of two defendants apprehended at Aberdeen Proving Ground was charged with speeding. The State statute provided that speed limits be set by the State Roads Commission or local authorities "having authority to enact laws and adopt local police regulations relating to traffic under the Constitution and laws of the State." The magistrate held that the installation commander was not a local authority because of the restrictive language of the statute.

Nevertheless, he refused to dismiss the case because "the substance and core of the offense . . . is that of driving a vehicle . . . at a speed in excess of authorized maximum limits" and the requirement that limits be set by the Commission or local authorities did "not affect the substantive definition of the offense or otherwise change the elements thereof." Because setting speed limits after making an engineering and traffic investigation constituted "merely ministerial administrative acts" and the policy of the Assimilative Crimes Act "is to afford to people on Federal enclaves the same protection that they would be afforded in the surrounding territory," the magistrate concluded that the commander's local speed limits could be assimilated.[940]

When a State statute requiring administrative activity is assimilated, it is split--the penal component of the statute is assimilated and the administrative component is left behind. Where the

two components are so interrelated as to make their division impossible, the question will arise whether the entire statute must be assimilated with the result that some unwanted State regulation of Federal activity will occur. Recall that under the McGlinn doctrine, civil laws requiring ongoing State administrative and regulatory activity do not survive a transfer of legislative jurisdiction.[941] In 1944, Oklahoma argued in Johnson v. Yellow Cab Transit Co.[942] that the penal provisions of its State liquor control laws were assimilated on Fort Sill together with the regulatory provisions so that an interstate shipment of liquor destined for Fort Sill could be seized. Without passing definitely on the contention, the Supreme Court noted that "a strong argument might be made that had Congress intended such a drastic result, it would have considered the problem and used more express language."[943] Faced with this kind of problem, judge advocates should adopt one of two positions: either the penal

component of the State statute alone should be assimilated because assimilation is consistent with the intent of the Assimilative Crimes Act to protect the installation or no part of the statute can be assimilated.

Although the Assimilative Crimes Act generally is beneficial to the military installation because it provides needed protection for the installation population, it can also operate against the installation's interests because all State criminal laws must be assimilated. For example, a State child abuse statute may require medical personnel to report suspected cases of child abuse, making military medical personnel criminally liable for failing to do so. This kind of statute will be assimilated on the installation, requiring installation medical personnel to make the required reports.[944]

In general, State criminal laws contrary to Federal policies and regulations cannot be

assimilated. Illustrations are provided in Nash v. Air Terminal Services, Inc.,[945] and Air Terminal Services, Inc. v. Rentzel,[946] decided in 1949. In the first case, the court held that Virginia segregation laws were adopted at Washington National Airport in the absence of any expression of Federal policy on the subject. Prior to the second decision, the Civil Aeronautics Authority issued regulations prohibiting segregation in Federal airports, permitting the same court that decided Nash to hold in Rentzel that the Virginia law could no longer be assimilated. When Federal law or policy exists, there is no need for assimilation and it is precluded by the terms of the Act itself. Like the McGlinn doctrine, where subsequently adopted Federal law displaces older Federal law synthesized from State law existing when jurisdiction was obtained, the existence of Federal law or policy simply precludes assimilation. This is not a manifestation of Federal supremacy.

To preclude assimilation, regulations must be lawful and in accord with larger Federal policy. In 1955, for example, the Department of Justice concluded that military regulations purporting to sanction bingo and similar games were contrary to Federal policy at the time, and therefore would not preclude assimilation of State gambling laws which would require the cessation of on-post gambling.[947] The Judge Advocate General disagreed. Current Army policy is a compromise, essentially precluding assimilation on exclusive jurisdiction installations but permitting it on concurrent jurisdiction installations.[948] Otherwise lawful Army regulations will preclude assimilation; subordinate regulations may not.[949]

The Assimilative Crimes Act only assimilates State crimes.[950] Where an act is not defined as a crime under State law it cannot be assimilated even if it is penalized under State law. This is the case with many State traffic laws.[951]In order to

protect the installation, noncriminal State traffic laws are independently punishable as a violation of a regulation of the Administrator of General Services. By statute, the Administrator can make "needful rules and regulations for the Government of the Federal property" under his or her control.[952] The Administrator can set reasonable penalties for violations which do not exceed a $50 fine and imprisonment for more than 30 days.[953] The Administrator's regulations can be extended to property under the control of other Government departments and over which the Government exercises exclusive or concurrent criminal jurisdiction.[954] The Administrator has done so for the Department of Defense, authorizing prosecution of State "vehicular and traffic offenses or infractions that cannot be assimilated."[955] Consequently, "State vehicular and pedestrian traffic laws that are now or may hereafter be in effect shall be expressly adopted and made applicable on military installations."[956]

Thus, when noncriminal State traffic violations are committed on exclusive or concurrent criminal jurisdiction installations, they are prosecuted, not under the Assimilative Crimes Act, but as a violation of a Government regulation.

The last category of criminal offenses punishable when committed on military installations are drug offenses punishable under the Controlled Substances Act.[957] These offenses are not dependent on legislative jurisdiction at all. Rather, because "intrastate incidents of the traffic in controlled substances . . . (have) a substantial and direct effect on interstate commerce" and because it is "impossible to distinguish between substances manufactured and distributed intrastate from those manufactured and distributed interstate,"[958] they are punishable wherever committed. It is no defense to a narcotics prosecution that the substance was locally manufactured.[959] In addition to prosecution of drug offenders, the Controlled Substances Act

permits forfeiture action to be taken against vehicles and other equipment, which has a connection with drug trafficking.[960]

d. Prosecution of offenses in Federal court. Civilians who commit Federal offenses are subject only to prosecution in Federal court. Soldiers who commit an offense punishable under Federal law and the Uniform Code of Military Justice can be tried either in Federal court or by court-martial. Generally, soldiers who commit offenses on military installations against other soldiers or family members of military or civilian personnel residing on the installation will be subject only to trial by court-martial.[961] Other offenses committed on military installations and offenses off the installation (except for those committed while the accused is engaged in scheduled military activities and in which no civilians are involved) are primarily subject to Federal prosecution.[962]

Where designated by the United States district court for the judicial district in which an installation is located, a United States magistrate may try misdemeanors and lesser offenses committed by adults on military installations.[963] A misdemeanor is an offense for which the maximum penalty does not exceed imprisonment for one year. Installation commanders can seek to have a magistrate designated to try cases that arise on the military installation.[964] Judge advocates and other officers designated by the commander can prosecute on behalf of the United States before a magistrate.[965]

Trial before a magistrate is voluntary and can proceed only with the defendant's written consent.[966] Proceedings can be recorded by a court reporter or by sound equipment.[967] The Federal Rules of Criminal Procedure apply in trials before a magistrate except in proceedings concerning petty offenses for which no sentence of imprisonment will be imposed.[968] Trial of a misdemeanor proceeds on an indictment,

information, or complaint; in the case of a petty offense, it may proceed on a citation or a violation notice.[969] Local rules of the district court can provide for payment of a fixed sum in lieu of appearing before the magistrate for suitable types of offenses.[970] Appeals from the magistrate are to the district court.[971]

Where a defendant does not consent to trial before the magistrate in petty offenses, the file is sent to the clerk of the district court and the defendant ordered to appear before the district court.[972] The district court may itself order that a case be conducted before a district judge rather than before the magistrate.[973] The United States also can move for the case to be heard in the district court.[974]

A juvenile[975] can be tried in a Federal court only where the United States attorney certifies to the district court that the State does not have jurisdiction,[976] refuses to assume jurisdiction over

the juvenile, or does not have available programs and services adequate for the needs of the juvenile.[977] Minor special territorial offenses are subject to prosecution without certification.[978] A juvenile can be tried by a magistrate for petty offenses based on a violation notice or complaint, but certification for nonspecial territorial offenses remains.[979] The magistrate cannot, however, impose any term of imprisonment.[980] In district court, a juvenile proceeding is based on an information.[981] A juvenile can be treated as an adult either on the juvenile's request or, in the case of a juvenile who is at least 15 and charged with a violent felony carrying a term of imprisonment of at least 10 years, by motion of the United States to "transfer" the case when adult treatment would be in the interests of justice.[982]

Chapter 3

Military Assistance to Civil Authorities

Section I

Introduction

3-1. General

This chapter provides information and reference material for the military lawyer on military assistance to civil authorities. It examines applicable legislation, statutes, Army regulations (AR), and Department of Defense (DOD) and Army policies together with the possible legal consequences that may arise from military assistance. Moreover, the chapter outlines the broad and varied role today's Army may be called upon to play in the civilian sector.

The United States Constitution requires that the armed forces be subordinate to civil authorities. This principle is firmly ingrained in our legal system. The President, the Secretary of Defense, and the Secretary of the Army are all civilians, as are the members of the legislative branch of the government; they all have authority, conferred by the Constitution, over the armed forces. This principle of civilian control is closely related to those provisions of the Constitution that, to prevent a concentration of power, vest the executive, legislative, and judicial powers of the United States in the President, the Congress, and the Supreme Court, respectively. It is likewise closely connected to the scheme of government that the Constitution created, a federal union composed of sovereign states, in which sovereign powers are distributed among the central government, the states, and the people.

These principles of civilian control presuppose a condition of peace and domestic tranquility. If, on the other hand, the civil authorities are powerless to act or if there is a grave danger during periods of war, insurrection, domestic unrest, or other forms of disturbance, whether caused by man or nature, the Constitution provides the powers necessary to deal with civil emergencies, maintain law and order, and preserve the integrity and independence of the nation. This grant of constitutional authority includes the power to call upon the armed forces to assist the civil authorities and the power to entrust to the armed forces authority to institute temporary measures of control over the civilian population should the need arise.

3-2. The Army's Role

Traditionally, armies have been raised and maintained to provide for the national defense, but today's Army is called upon to perform a host of other functions as well. The Army is involved in the civilian sector of our country to an extent and in a manner not seen since World War II. Civilian disturbances during the late 1960's and early 1970's in various parts of the country necessitated the use of large numbers of military personnel to restore order. Brigades of troops have been airlifted hundreds of miles to potential trouble areas. The Army receives numerous requests from civilian law enforcement agencies for the temporary loan of various items of military equipment. The Military Assistance to Safety and Traffic (MAST) Program provides for the use of Army helicopters and personnel as medical evacuation teams for victims of automobile and other accidents. Army Explosive Ordnance Disposal (EOD) personnel are often called upon by civilian police agencies to assist in the

disposal of bombs and other explosive devices. Troops are also used to provide assistance during times of natural disaster. During the postal strike of 1970, the Army was called upon to furnish personnel for the operation of post offices in several cities.

Rendering military assistance to civil authorities poses unique problems for military commanders and their troops. What authority does a military commander have when ordered into a city to quell a civil disturbance? Does the commander have authority to order the arrest of those creating the disturbances? When may soldiers use force in carrying out their duties? Is the use of deadly force ever justified? What liability may individual soldiers incur for acts committed by them in the performance of their duty? When may a commander loan Army equipment to civilian law enforcement agencies? Could a civilian accident victim who is medically evacuated aboard an Army helicopter

recover damages from the pilot or the United States if the helicopter crashes due to the pilot's error? These are some of the questions and problem areas that will be discussed in the following sections of this chapter.

3-3. Explanation of Terms

To facilitate understanding the terms used in Military Assistance to Civil Authorities, the following definitions will apply throughout this chapter.

a. Civil authorities are those elected and appointed public officials and employees who constitute the governments of the 50 states, District of Columbia, Commonwealth of Puerto Rico, U.S. possessions and territories, and political subdivisions thereof.[983]

b. Civil disturbances are group acts of violence and disorders that are prejudicial to public law and

order. The term civil disturbances includes all domestic conditions requiring or likely to require the use of federal armed forces pursuant to the provisions of chapter 15, title 10, United States Code.[984]

c. Terrorism is the calculated use of violence or the threat of violence to attain goals that are political, religious, or ideological in nature. This is done through intimidation, coercion, or instilling fear. Terrorism involves a criminal act that is often symbolic in nature and intended to influence an audience beyond the immediate victims.[985] A terrorist incident is a form of civil disturbance.

d. Federal property is property owned, leased, possessed, or occupied by the federal government.[986]

e. Federal function is any function, operation, or action, carried out under the laws of the United States by any department, agency, or instrumentality

of the United States or by an officer or employee thereof.[987]

f. An objective area is the city or other geographical location where a civil disturbance is occurring or is anticipated, and where federal armed forces are, or may be, employed.[988]

g. Military resources include military and civilian personnel, facilities, equipment, services, and supplies under the control of a DOD components.[989]

h. Insurrection is the act of unlawfully rising in open resistance against established authority or government, or to the execution of the laws of a government, and may exist without a state of war.[990]

i. Martial law is the exercise of partial or complete military control over domestic territory in time of emergency because of military public necessity. In the United States, it is usually authorized by the President, but may be imposed by a military commander in the interest of public safety. It is called martial rule.[991]

j. A major disaster is any disaster caused by flood, drought, fire, earthquake, storm, hurricane, or other catastrophe that is serious enough to warrant disaster assistance by the federal government.[992]

k. A civilian law enforcement official is an officer or employee of a civilian agency with responsibility for enforcement of the laws within the jurisdiction of the agency.[993]

l. A state includes any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, Northern Marianna Islands, and the Trust Territory of the Pacific Islands.[994]

m. A local government includes any county, city, village, town, district, or other political subdivision of any state.[995]

Section II

Military Support to Civilian Law Enforcement Officials

3-4. Use of Military Personnel

a. General. Department of the Army policy is to cooperate with civilian law enforcement officials to the maximum extent possible consistent with (1) the needs of national security and military preparedness, (2) the tradition of limiting direct military involvement in civilian law enforcement activities, and (3) the requirements of applicable law.[996]

b. The Posse Comitatus Act. The primary statutory restriction on the participation of military personnel in civilian law enforcement activities is the Posse Comitatus Act. The Act provides that "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse

comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."[997] The term "posse comitatus" means the power of the county and refers to the authority of the sheriff to call to his aid the male population of the county above the age of 15 to assist in capturing escaped felons and keeping the peace.[998] The use of the Army to enforce civil law was not unusual in the history of our nation. Following the Civil War, federal troops were regularly used to enforce the Reconstruction Acts. It was to curb the use of soldiers in such a manner that led Congress to enact the original Posse Comitatus Act in 1878. The immediate impetus to the Act's passage appears to have been Congress' strong resentment of the use of federal troops to guard voting places in the South during the 1876 presidential election.[999]

The proscriptions of the Act apply to the enforcement of federal, state, or local law by

members of the Army or Air Force. The Act makes unlawful the willful use of "any part of the Army or the Air Force,"[1000] absent constitutional or statutory authority. Although not expressly applicable to the Navy and Marine Corps, the prohibitions of the Posse Comitatus Act have been extended to similarly restrict the use of personnel of the Navy and Marine Corps without proper approval by the Secretary of Defense or Secretary of the Navy.[1001] These restrictions on the use of military personnel do not apply to the following persons.[1002]

(1) Members of a reserve component when not on active duty or active duty for training.

(2) A member of the national guard when not in federal service.

(3) A civilian employee of the Department of Defense (DOD). If the civilian employee is under the direct command and control of a military officer, assistance will not be provided unless it

would likewise be permissible to use a soldier on active duty who is in a duty status.

(4) A soldier when off-duty and in a private capacity. A soldier is not acting in a private capacity when assistance to law enforcement officials is rendered under the direction, control, or suggestion of DOD authorities.

(5) Members of the Coast Guard during peacetime.[1003]

c. Possible consequences of a violation of the Posse Comitatus Act.

(1) Criminal sanctions. The Posse Comitatus Act provides that whoever willfully violates its provisions will be subject to imprisonment for not more than two years or a fine of $10,000, or both.[1004] Since its enactment, no one has been prosecuted for violating the Act.

(2) Inability to convict offenders.

(a) Exclusionary rule. Evidence obtained as a result of a violation of the Posse Comitatus

Act may be ruled inadmissible against a defendant in a criminal prosecution. The seriousness of the particular violation and the frequency of such violations within the jurisdiction of the determining court appear to be the important factors in connection with whether a court will exclude evidence in a case.[1005] The fact alone that the Act has been violated has not been determinative.[1006] This is quite different from the application of the exclusionary rule in cases involving violations of the Fourth Amendment to the Constitution,[1007] where a finding that evidence was seized in violation of a defendant's rights against unreasonable search and seizure will result in its exclusion.

(b) Failure to prove element of offense. Violations of the Posse Comitatus Act by law enforcement officials can be raised by a defendant to defeat a prosecution for an offense that specifically requires lawful conduct on the part of those officials.[1008]

(3) Civil liability. Soldiers whose negligence causes property damage, injury, or death are protected against suits for money damages by the federal Tort Claims Act[1009] and the Driver's Act,[1010] provided that they were acting within the scope of their employment at the time the damage, injury, or death occurred. Army personnel whose conduct violates the Posse Comitatus Act may be considered as not acting within the scope of their employment.[1011] As a result, they may not be entitled to protection against claims for money damages arising out of such conduct. In such cases, they would be exposed to personal liability for their actions. The fact alone that the Posse Comitatus Act has been violated has been held not to give rise to a civil cause of action.[1012]

d. Permissible direct assistance. The following activities involving direct assistance by military personnel are not prohibited by the Posse Comitatus Act:

(1) Military purpose doctrine. Actions taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities, do not violate the Posse Comitatus Act.[1013] Sometimes referred to as the Military Purpose Doctrine,[1014] this provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials. It should not be used as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include the following, depending on the nature of the DOD interest and the specific action in question:[1015] actions related to enforcement of the Uniform Code of Military Justice; actions that are likely to result in administrative proceedings by DOD, regardless of whether there is a related civil or criminal proceeding; actions related to the commander's inherent authority to maintain law and

order on a military installation or facility; protection of classified military information or equipment; protection of DOD personnel, DOD equipment, and official guests of DOD; and, other actions undertaken primarily for military or foreign affairs purposes.

(2) Jurisdictional limits. The limits on court-martial jurisdiction should not be confused with the less restrictive limits on investigatory jurisdiction. Investigatory jurisdiction is, by necessity, broader than court-martial jurisdiction since the existence of court-martial jurisdiction cannot be ascertained until a full investigation of the circumstances surrounding the criminal activity has been completed. In this regard, the Memorandum of Understanding (MOU) between the Departments of Justice and Defense, dated August 1984, relating to the investigation and prosecution of certain crimes should be consulted to determine if an investigation of the offense complies with the MOU. As long as

the military pursues the investigation of an offense, not within the DOJ purview, with a view toward establishing facts to sustain court-martial jurisdiction or to pursue a legitimate military function or purpose, then any incidental investigative benefit to civilian law enforcement officials is immaterial. The Posse Comitatus Act does not prohibit a military investigation in an area of interest to the military that falls within the military purpose doctrine, notwithstanding an ultimate lack of court-martial jurisdiction.

(3) Sovereign authority. Actions taken under the inherent right of the United States Government, a sovereign national entity under the Constitution, to ensure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary, do not violate the Posse Comitatus Act. This authority is reserved for unusual circumstances and should properly be exercised in only two circumstances:[1016]

(a) Emergency. Prompt and vigorous federal action, including use of military forces, is authorized to prevent the loss of life or wanton destruction of property and to restore governmental functioning and public order. These actions will be taken when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions so much that duly constituted local authorities are unable to control the situation.

(b) Protection of federal property and functions. Federal action, including the use of military forces, is authorized to protect federal property and functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection.

(4) Statutory authority. Actions taken under express statutory authority to assist civilian officials in execution of the laws do not violate the Posse Comitatus Act.[1017] Although there are no

express constitutional exceptions to the Posse Comitatus Act, there are a number of federal laws which permit direct military participation in civilian law enforcement. These include statutes authorizing the use of military personnel in training and providing expert advice to civilian law enforcement officials;[1018] in operating and maintaining equipment used for monitoring and communicating the movement of air and sea traffic at the request of certain federal civilian officials;[1019] and in civil disturbance operations.[1020]

e. Prohibited direct assistance. The use of military personnel as a posse comitatus or otherwise to execute the laws prohibits the following forms of direct assistance:[1021]

(1) Interdiction of a vehicle, vessel, aircraft, or other similar activity.

(2) Search or seizure.

(3) Arrest, stop and frisk, or similar activity.

(4) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

f. Permissible indirect assistance. The following forms of indirect assistance activities are not restricted by the Posse Comitatus Act:[1022]

(1) Transfer of information acquired in the normal course of military operations.

(2) Other actions approved by Headquarters, Department of the Army (HQDA), that do not subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

g. Approval authority. Requests by civilian law enforcement officials for use of Army personnel must be forwarded through command channels to the appropriate approval authority.[1023]

(1) Approval authorities for the use of Army personnel in civil disturbances are specified in AR 500-50.

(2) Requests for the assignment of Army personnel to provide assistance to civilian law enforcement officials must be forwarded to HQDA (DAMO-ODS) for disposition, as specified in AR 500-51. Requests required to be submitted to the approval authority for disposition include those in which subordinate authorities recommend denial.

3-5. Use of Collected Information, Military Equipment, and Facilities

a. General. The Posse Comitatus Act is a general prohibition against the use of military personnel in the enforcement of federal, state, or local law. It does not affect the legality of assisting civilian officials by providing them information collected in the normal course of military activities, loan of military equipment, and the use of military installations and facilities.

b. Collected information. Army organizations are encouraged to furnish information collected in the normal course of military operations to the civilian law enforcement agency having jurisdiction over the violation of federal, state, or local law to which such information is reasonably relevant.[1024] The release of such information is controlled by the provisions of AR 500-51 and the authorities cited therein.

Military training and operations may be planned and executed in a way that is compatible with the needs of civilian law enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. This would not, however, permit planning or creating missions or training for the primary purpose of aiding civilian law enforcement officials. It would also not permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

c. Equipment and facilities. Army equipment, installation facilities, and research facilities may be properly made available to federal, state, or local civilian law enforcement officials for law enforcement purposes provided that:

(1) Such assistance does not adversely affect national security or military preparedness;[1025] and

(2) The appropriate approval authority has granted the request for assistance.[1026]

d. Approval authority.

(1) Requests for the following must be processed under the Army Regulations indicated: Military assistance in the event of civil disturbance (AR 500-50); disaster relief (AR 500-60); explosive ordnance support (AR 75-15); and support to the United States Secret Service (AR 1-4).

(2) Requests for equipment not connected with civil disturbance, disaster relief, or support to the Secret Service should be processed as follows:

(a) Requests for the following must be forwarded from the major Army command to HQDA (DALO-SMS): arms, ammunition, combat and tactical vehicles and vessels, aircraft, other equipment in excess of 60 days, and special equipment requiring DOD approval.[1027]

(b) Requests for equipment other than arms, ammunition, combat and tactical vehicles and vessels, and aircraft may be approved by the installation commander if the requested duration of the loan or lease is 60 days or less.[1028]

(c) Requests for the use of installation or research facilities must be forwarded from the major Army command to HQDA (DAMO-ODS) for approval.[1029]

(d) Requests for Army intelligence components to provide assistance will be forwarded from the major Army command to HQDA (DAMI-CI) for disposition in accordance with AR 381-10.[1030]

3-6. Reimbursement

a. General. In general, reimbursement is required when equipment or services are provided to agencies outside DOD. Certain civilian law enforcement agencies may be required to provide the supporting installation with a fund advance based on the estimated cost of equipment and services. Specific costing and accounting guidance is provided by AR 500-51.[1031]

b. Equipment loans to federal agencies. Equipment provided to other federal agencies, such as the Customs Service, Border Patrol, and federal Bureau of Investigation, may be loaned in accordance with the Economy Act.[1032] Specific guidance on reimbursement for the loan of equipment or supplies is provided in AR 700-131. All incremental costs associated with the loan, such as packing, crating, and transportation, must be reimbursed by the borrower.[1033]

c. Leasing of equipment to non-federal agencies. Primary authority for making equipment available to

non-federal agencies is the Leasing Statute.[1034] In addition to incremental costs, non-federal activities are required to pay rental fees for the use of Army equipment; appropriate charges should be made pursuant to AR 37-60.

d. Telecommunications services. Reimbursement for telecommunications services should be in accordance with AR 105-23 and AR 37-61.

e. Waivers.

(1) Approval authority. When reimbursement is not required by law for a particular form of assistance, a request for a waiver of reimbursement may be granted. All requests for waivers must be submitted to HQDA (DALO-SMS or DAMO-ODS, as appropriate). The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) is the approval authority to waive reimbursement.

(2) Conditions for approval. A request for waiver may be granted in the following circumstances:[1035]

(a) When assistance pursuant to AR 500-51 is provided as an incidental aspect of an activity that is conducted for a military purpose.

(b) When assistance pursuant to AR 500-51 involves the use of Army personnel in an activity that provides the Army with training or operational benefits substantially equivalent to the benefit of Army training or operations.

(c) When reimbursement is not otherwise required by law.

(d) When a waiver of reimbursement is determined not to have an adverse impact on military preparedness.

(3) Evaluation factors. HQDA (DAMO-ODS) will take the following factors into consideration when evaluating requests for waivers of reimbursement:

(a) Budgetary resources available to civilian law enforcement agencies.

(b) Past practices with respect to similar types of assistance.

Section III

Use of Military Forces in Civil Disturbances

3-7. General

Under the Constitution and laws of the United States, the protection of life and property and the maintenance of law and order within the territorial jurisdiction of any state are the primary responsibility of local and state governments, and the authority to enforce the laws is vested in the authorities of those governments. Generally, federal armed forces are employed after state and local authorities have utilized all of their own forces that are reasonably available and are unable to control the situation, or when the situation is beyond the capabilities of state or local authorities. Federal forces may also be employed when there is a lawful basis to do so and state and

local authorities will not take appropriate action. Employment of Army personnel in civil disturbance operations may take place only under the provision of AR 500-50 and when the Secretary of the Army has so ordered, except in cases of emergency as discussed in paragraph 3-9b.

3-8. Civil Disturbance

Chapter 15 of title 10, United States Code, titled Insurrection, contains statutes that permit the commitment of federal forces to restore order in conditions of civil disturbance, including terrorism. These statutes are exceptions to the proscriptions of the Posse Comitatus Act.

a. State requests for aid. Basic DOD policy is that the primary responsibility for maintaining law and order lies with the state and local governments and their law enforcement agencies.[1036] However, where the state and local authorities have fully

utilized their own resources without being able to control a civil disturbance, procedures do exist whereby federal military assistance may be obtained.

Article IV, Section 4, of the United States Constitution guarantees every state a republican form of government and requires the United States to protect them against invasion and domestic violence.[1037] Pursuant thereto, Congress has enacted legislation providing that the President may, upon request of a state legislature, or its governor if the legislature cannot be convened, "use such of the armed forces, as he considers necessary to suppress the insurrection."[1038]

A formal request by a state for the assistance of federal armed forces must originate with the legislature of the state concerned, or with the governor if the legislature cannot be convened, and should be made directly to the President. The Attorney General of the United States has been

designated by the President to receive and coordinate preliminary requests from states for federal military assistance.[1039] Should such an application, either formal or preliminary, be presented to a local commander, that commander must inform the person making the application to address the request to the Attorney General. The commander must also immediately inform the Chief of Staff of the Army of the request and all known material facts pertaining thereto.[1040]

b. Enforcement of federal authority. Pursuant to Article II, section 3, of the Constitution, it is the duty of the President to see that the laws of the United States are faithfully executed.[1041] Congress has implemented this provision by providing that whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any state or territory by the

ordinary course of judicial proceedings, the President may utilize such federal armed forces deemed necessary to enforce those laws, or to suppress the rebellion.[1042]

c. Protection of constitutional rights. The Fourteenth Amendment to the Constitution forbids any state to deny equal protection of the laws to any person within its jurisdiction.[1043] Congress has implemented this provision by providing that whenever insurrection, civil violence, unlawful combinations, or conspiracies in any state so oppose, obstruct, or hinder the execution of the laws of the state and of the United States, as to deprive any of the population of that state of rights, privileges, and immunities named in the Constitution and secured by laws, and the authorities of that state are unable, fail, or refuse to provide such protection, it will be deemed a denial by that state of the equal protection of the laws. Thereupon it becomes the duty of the

President to take such measures, by intervention with federal armed forces, or by other means, deemed necessary, to suppress such disturbances.[1044]

d. Procedures. Whenever the President considers it necessary to use the National Guard or federal armed forces under the authority of the intervention statutes discussed above, the President must immediately issue a proclamation ordering the insurgents to disperse and retire peaceably to their abodes within a limited time.[1045] If the proclamation is not obeyed, an executive order is then issued directing the Secretary of Defense to employ such National Guard or federal troops as are necessary to restore law and order. No employment orders will be issued by the Department of the Army until this is accomplished and the President directs the Secretary of Defense to take the necessary action.[1046] This does not, however, preclude the alerting of forces and, if necessary, the prepositioning of predesignated forces at the direction of the

Secretary of the Army as Executive Agent for DOD in civil disturbance operations.[1047]

3-9. Nonstatutory Authority

a. Protection of federal property and functions. The rights of the United States to protect federal property or functions by intervention with federal military forces is an accepted principle of our government. The right extends to all federal property and functions wherever located. This form of intervention is warranted, however, only where the need for protection exists and local civil authorities cannot or will not give adequate protection.[1048] To maintain law and order and protect his installation and the activities thereon, the commander may take such actions as are reasonably necessary and lawful.[1049] Such actions may include ejection from, or denial of access to, the installation of individuals who threaten a civil

disturbance upon or directed against the installation or its activities.[1050]

b. Emergency. Occasions may arise that call for a military response under circumstances where there is no time to wait for instructions from higher headquarters. In cases of sudden and unexpected invasions or civil disturbance, including civil disturbances incident to earthquake, fire, flood, or other public calamity endangering life or federal property or disrupting federal functions or the normal processes of government, or other equivalent emergency so imminent as to make it dangerous to await instructions from the Department of the Army, an officer of the active Army in command of troops may take necessary law enforcement activities before the receipt of instructions.[1051] The best example of use of federal military forces during emergency conditions occurred during the San Francisco earthquake of 1906. The commanding general of the Presidio of San Francisco awoke during the

earthquake and was unable to communicate with his higher headquarters or the local municipal authorities because all available means of communication had been destroyed. Seizing the initiative, he dispatched his available troops to aid the civilian authorities of the city in performing essential police and fire fighting missions, thereby enabling the city authorities to maintain law and order. In view of the availability of rapid communications capabilities today, it is unlikely that action under this authority would be appropriate.

c. Martial law. It is unlikely that situations requiring the employment of federal armed forces during civil disturbance operations will necessitate the declaration of martial law. When such forces are employed in the event of civil disturbances, their proper role is to support, not supplant, civil authority. Martial law depends for its justification upon public necessity. Necessity

gives rise to its imposition; necessity justifies its exercise; and necessity limits its duration. The extent of the military force used and the legal propriety of the measures taken, consequently, will depend upon the actual threat to order and public safety that exists at the time. In most instances, the decision to impose martial law is made by the President, who normally announces the decision by a proclamation that usually contains instructions concerning the exercise of martial law and any limitations thereon. Nevertheless, the decision to impose martial law may be made by the local commander on the spot, if the circumstances demand immediate action and time and available communications facilities do not permit obtaining prior approval from higher authority. Whether or not a proclamation of martial law exists, it is incumbent upon commanders concerned to weigh every proposed action against the threat to public order and safety so that the necessity for martial law is

accurately determined. Except in the limited circumstances mentioned in paragraph 3-9b, above, when conditions requiring the imposition of martial law arise, the military commander at the scene must inform the Army Chief of Staff, and await instructions. When federal troops have been employed in an objective area in a martial law situation, the population of the affected area must be informed of the rules of conduct and other restrictive measures the military is authorized to enforce. These normally will be announced by proclamation or order and will be given the widest possible publicity by all available media. Federal troops ordinarily will exercise police powers previously inoperative in the affected area, restore and maintain order, ensure the essential mechanics of distribution, transportation, and communications, and initiate necessary relief measures.[1052]

3-10. Responsibilities in Civil Disturbance Activities

a. Attorney General. The Attorney General of the United States has been designated the chief civilian officer in charge of coordinating all federal governmental activities relating to civil disturbances, to include acts of domestic terrorism.[1053] Formal requests from the states for aid in accordance with section 331, title 10, United States Code, will be made to the President who will determine what action will be taken.[1054] When a civil disturbance is imminent or in progress, and it appears that federal assistance may be required, the Department of Justice may send a representative to that area to assess the situation and make appropriate recommendations. This representative is designated as the Senior Representative of the Attorney General (SRAG) and is the coordinator of

all federal activities in the objective area including liaison with local civil authorities.[1055]

b. Secretary of the Army. The Secretary of the Army is the Executive Agent of the Department of Defense (DOD) in all matters pertaining to the planning for, and the deployment and employment of, military resources in the event of civil disturbances.[1056] The responsibilities of the Secretary of the Army as DOD Executive Agent are detailed in DOD Directive 3025.12.

c. Chief of Staff, U.S. Army. The Chief of Staff of the Army exercises, through the designated task force commander, direction of federal forces employed in civil disturbance operations. The Chief of Staff also informs the Secretary of the Army of any unusual resource requirements and other significant developments in connection with civil disturbance operations and planning.[1057]

d. Director of Military Support. The Director of Military Support (DOMS), the action agent for the

DOD Executive Agent, plans for, coordinates, and directs the employment of all designated federal military resources for the DOD Executive Agent in civil disturbance operations and serves as the point of contact for DOD in such matters. DOD components having cognizance over military resources are responsible for supporting the DOD Executive Agent through the DOMS in matters pertaining to civil disturbances.[1058] The Office of the Director of Military Support is an activity within the Office of the Deputy Chief of Staff for Operations and Plans, U.S. Army.[1059]

e. Personal Liaison Officer, Chief of Staff, Army (PLOCSA). The Chief of Staff of the Army, as the commander of all federal armed forces deployed to a civil disturbance objective area, will normally appoint a personal liaison officer to go to the area of the disturbance for the period of time necessary to restore law and order. The PLOCSA, a general officer, is briefed by and is responsive to the

DOMS, who acts for the Chief of Staff in this regard. The PLOCSA effects close coordination with the SRAG and establishes and maintains liaison with responsible municipal, state, and DOD officials. Upon receipt of information from the PLOCSA, the DOMS will inform the Chief of Staff of existing conditions within the area of the civil disturbance. In addition, the PLOCSA will assist and advise the designated task force commander, as required.[1060]

f. Department of the Army Liaison Team. The Department of the Army Liaison Team (DALT) serves as the staff of the PLOCSA and is responsive to the PLOCSA's direction. The DALT is comprised of a team chief and representatives of Deputy Chief of Staff for Personnel, Deputy Chief of Staff for Logistics, Assistant Chief of Staff of Intelligence, Deputy Chief of Staff for Operations and Plans, The Judge Advocate General, Surgeon General, and Chief of Information.[1061]

g. Military task force commander. The military task force commander is the duly designated military commander at the civil disturbance objective area. The military task force commander takes action to the extent necessary to accomplish the mission. In the accomplishment of the mission, reasonable necessity is the measure of authority, subject to instructions received from superiors. The task force commander will cooperate with and assist, to the fullest extent possible, the Governor and other state and local officials and forces, unless or until such cooperation interferes with the accomplishment of the mission. Even though the task force commander may direct subordinate elements of the command to assist designated civil authorities or police officials, military personnel will not be placed under the command of any local or state civil official, officer of the state defense forces, or officer of the National Guard not in federal service.[1062] This requirement does not preclude the

establishment of joint patrols and jointly manned fixed posts.[1063]

h. Local commander. In the event an application for aid from state authorities based on section 331, title 10, United States Code, is presented to a local commander, that commander will request the person making the application to transmit the request to the Attorney General. The commander will also inform the Chief of Staff of the Army of the fact of the request by the most expeditious means and include in such report a statement of all material facts known in accordance with Army Regulation 500-50.[1064]

3-11. Civil Disturbance Legal Problems

a. Application of force. The primary rule governing the actions of federal military forces in assisting state and local authorities in restoring law and order is that the military commander must at

all times use only the minimum force required to accomplish his mission.[1065]

(1) Use of nondeadly force. Commanders are authorized to use nondeadly force for the following purposes:

(a) To control the disturbance.

(b) To prevent crimes.

(c) To apprehend or detain persons who have committed crimes. The degree of force used must be no greater than that reasonably necessary under the circumstances.[1066]

(2) Use of deadly force. The use of deadly force is authorized only where all three of the following circumstances are present:

(a) Lesser means have been exhausted or are unavailable, and

(b) The risk of death or serious bodily harm to innocent persons is not significantly increased by its use, and

(c) The purpose of its use is one or more of the following:[1067]

1. Self-defense to avoid death or serious bodily harm.

2. Prevention of a crime that involves a substantial risk of death or serious bodily harm (*eg.*, to prevent sniping).

3. Prevention of the destruction of public utilities or similar property vital to public health or safety as determined by the task force commander.

4. Detention or prevention of the escape of persons who, during the detention or in the act of escaping, present a clear threat of loss of life or serious bodily injury.

Army Field Manual 19-15 contains further detailed policies and rules concerning the issuance and control of live ammunition, control over and firing of weapons, delegation of authority to authorize the

use of deadly force, selection of tactics and techniques, and the options for arming troops.

b. Arrest and detention of civilians. There is no express statutory authority for military personnel to arrest civilians merely because they are performing their duties in implementation of the federal intervention statutes. Nevertheless, when acting under orders to quell civil disturbances, the authority of members of the federal armed forces includes the power of detention, which is considered to flow either from the power to arrest of the local law enforcement officers who are being assisted or from the inherent nature of the soldier's duty. Whatever the authority of the federal armed forces in this type of situation, they should not detain civilians when there are local or state law enforcement officers or civilian federal law enforcement officers (such as FBI agents) present and capable of performing this function.[1068]

When members of the federal armed forces do take civilians into custody, the detainees must be turned over to civil authorities as soon as possible. Army personnel are prohibited from operating temporary confinement/detention facilities unless local facilities under the control of city, county, and state governments and the U.S. Department of Justice cannot accommodate the number of persons apprehended. Even under these circumstances, prior approval of the Chief of Staff, U.S. Army, is required.[1069]

c. Search and seizure. Searches made without warrant, other than those incident to lawful apprehension or arrest, must have some basis in need, such as dealing with a sniper, and may not be conducted when there is no immediate danger of violence. When faced with an apparent need to conduct a search without a warrant, the commander must make an independent determination of the need for immediate action ("military necessity") and not

commit federal troops to such activity solely on the say of civilian officials.[1070]

d. Billeting of troops. The acquisition of land and/or buildings for use in storing equipment and billeting and feeding troops when they are given breaks in street duty is another problem that the military commander and the commander's judge advocate are likely to face during the civil disturbance situation. The preferred choice of facilities, of course, would be nearby military facilities or other federally-owned property. If these are not available, consent to use state or municipally-owned facilities should be sought from the appropriate governmental body.[1071]

e. Interference with federal officers. The Civil Obedience Act of 1968[1072] makes it a federal offense to obstruct, impede, or interfere with any firefighter or law enforcement officer engaged in the performance of his or her official duties. Included within the definition of law enforcement

officers are members of the federal armed forces and state National Guard who are actively engaged in controlling civil disorders.

3-12. End of Commitment of Forces

The use of federal military forces for civil disturbance operations should cease as soon as the necessity for them ends and the normal civil processes can be restored. Determinations of the end of the necessity will be made by the Department of the Army after coordination with the Department of Justice. The military commander will submit his recommendations directly to HQDA (DACS-MSO-W) in accordance with the requirements of AR 500-50.[1073]

Section IV Military Assistance in Civil Disasters and Emergencies

3-13. Domestic Disaster Relief

a. Authority. The Disaster Relief Act of 1974, as amended,[1074] is the basic authority for providing federal aid to state and local governments in cases of major disasters. It has been implemented within DOD and the Department of the Army by DOD Directive 3025.1 and AR 500-60, respectively.

b. Policy and responsibilities. DOD policy is that responsibility for disaster relief is mainly that of the individual, families, private industry, local and state governments, the American National Red Cross (ANRC), and federal agencies designated by statute.[1075]

(1) Federal Emergency Management Agency (FEMA). FEMA directs and coordinates federal emergency or major disaster relief inon behalf of the President. When the President declares an emergency or major disaster pursuant to the Disaster Relief Act of 1974, as amended,[1076] the FEMA Director or Regional Director may direct any federal agency to assist state and local governments.[1077]

(2) Secretary of the Army. The Secretary of the Army is designated as the DOD Executive Agent for military support in Presidentially declared major disasters and emergencies within the United States and any other disasters and emergencies when directed by the Secretary of Defense.[1078]

(3) Director of Military Support (DOMS). The DOMS acts for the DOD Executive Agent (the Secretary of the Army). The DOMS is charged with developing procedures for and monitoring the employment of DOD resources in disaster relief.[1079]

(4) Commander, Forces Command (FORSCOM). The CG, FORSCOM, has been delegated the authority of the Secretary of the Army as DOD Executive Agent for the conduct of disaster relief in the continental United States (CONUS). CG, FORSCOM, may task DOD components for resources for disaster relief within the 48 contiguous states and the District of Columbia.[1080]

(5) Commanders, unified commands. The Secretary of the Army has delegated the authority for the conduct of disaster relief operations outside the CONUS to the commanders of the appropriate unified commands in whose area the disaster or emergency occurs.[1081]

(6) CONUS Army commanders. CONUS Army commanders are responsible for planning for and conducting disaster relief operations in their areas of responsibility. They will appoint a DOD military representative (O-6 or above) as Disaster Control Officer.[1082]

(7) Disaster Control Officer (DCO). The DCO, who is appointed by the cognizant CONUS Army Commander, will be the single point of contact for the Federal Coordinating Office (FCO) during each declared emergency or disaster. Consideration should be given to appointing the U.S. Army Corps of Engineers District Engineer as the DCO. The DCO

coordinates all FEMA mission assignments for military assistance.[1083]

(8) MACOM commanders. MACOM commanders will support disaster relief as required by CG, FORSCOM, or appropriate unified commander. They will take action during any local imminent serious situation, as discussed in paragraph 3-13c, reporting such action concurrently to HQDA and the proper CONUS Army commander. MACOM commanders will also provide resources for disaster relief on request. These resources will be under the operational control of the military commander in charge of relief operations.[1084]

(9) Army commanders. Army commanders will conduct disaster relief operations during emergencies, as discussed in paragraph 3-13c, and when directed by higher authority.[1085]

(10) Commanding General, U.S. Army Health Services Command, and Commanding General, U.S. Army Corps of Engineers. The responsibilities of the

Commanding General, U.S. Army Health Services Command,[1086] and the Commanding General, U.S. Army Corps of Engineers are addressed in AR 500-60.[1087]

(11) Army National Guard. When not in active federal service, Army National Guard (ARNG) forces will remain under the control of the state governor and normally will be assigned missions through their chain of command. With the concurrence of the governor, however, they may accept missions from the CONUS Army commander on a reimbursable basis. Units may take federally owned ARNG equipment with them when ordered into disaster relief areas.[1088]

(12) Army Reserve units and individuals. Army Reserve (USAR) units or individuals may perform disaster relief operations when ordered to active duty after the President has declared a national emergency, when ordered by the Department of the Army as annual training, and when approved by CG, FORSCOM, in a voluntary active duty for training (ADT) status. USAR commander may approve voluntary

USAR participation during imminent serious conditions, as discussed in paragraph 3-13c, in a nondrill, nonpay status.[1089]

c. Imminent serious emergency. Army commanders are responsible for conducting disaster relief operations when directed by higher authority. Under certain emergency circumstances, however, they may conduct disaster relief operations without such prior direction by higher authority. When a serious emergency or disaster is so imminent that waiting for instructions from higher authority would preclude effective response, a military commander may do what is required and justified to save lives, prevent immediate human suffering, or lessen major property damage or destruction. In such a case, the commander will report the action taken to higher authority as soon as possible. Where continued support will be necessary or is beyond the ability of the commander to sustain, the commander will request guidance from higher authority. In

emergency situations as just described, the commander will not delay or deny support pending receipt of a reimbursement commitment from the requestor.[1090]

d. Posse Comitatus Act. The Posse Comitatus Act[1091] makes it unlawful for anyone to willfully use any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws, unless such use is expressly authorized by the Constitution or federal statute. This law does not prohibit the military services from rendering humanitarian service or assistance in disaster situations, providing emergency medical care and treatment for civilians, or providing assistance in deactivating and destroying explosives found within civilian communities. Military commanders, however, must ensure that DOD military and civilian personnel taking part in disaster relief do not enforce or execute civil federal, state, or local law in violation of the Posse Comitatus Act. See section

II of this chapter for a detailed discussion of the subject of military assistance to civilian law enforcement officials.

e. Funding and reimbursement. Funds for disaster relief are not programmed in the Army's normal budget, nor are fund reserves held for disaster relief.[1092] When the costs of Army assistance in a major disaster or emergency are over normal operating expenses, a request for reimbursement must be made to FEMA. Within 90 days after completion of the Army's task, a final accounting of all costs incurred must be submitted.[1093] Requests for repayment must identify and segregate personal services, travel and per diem, and all other expenses, including emergency aid furnished at the request of a FEMA Regional Director before a major disaster or emergency is declared. The special funding and accounting procedures applying to disaster relief are set out

in AR 500-60, Chapter 5. Procedures for accounting for use of Army resources are in AR 37-108.

3-14. Foreign Disaster Relief

a. General. The Department of State Agency for International Development (AID) is primarily responsible for deciding when and to what extent the United States will provide disaster aid to foreign countries or international organizations.[1094]

b. DOD participation. DOD takes part in foreign disaster relief only on request for assistance and allocation of funds from the Department of State. This does not preclude a military commander at the scene of a foreign disaster from responding to an imminent serious condition, as discussed in paragraph 3-1c. The commander must report at once the action taken and request further guidance through military command channels.[1095]

c. Authority.

(1) Within the Office of the Secretary of Defense (OSD), the Assistant Secretary of Defense (International Security Affairs) (ASD) (ISA) makes the basic decision of DOD responses to Department of State requests for foreign disaster relief.[1096]

(2) The unified and specified commands take part in disaster relief as directed by the Joint Chiefs of Staff (JSC).[1097]

(3) Army commanders take part in foreign disaster relief as requested by ASD (ISA), the JCS, or the unified and specified commanders. Oversea commanders may respond to disaster relief requests from the Chief of the Diplomatic Mission only after the Department of State allocates funds.[1098]

3-15. Operation of Public Services and Transportation

a. Peacetime. Authority for use of military personnel to maintain and operate federal functions normally provided in peacetime by civilian workers

is contained in the Economy Act.[1099] The Economy Act authorizes any agency of the federal government to order equipment, work, or services from any organizational unit within the same agency or from any other federal agency. An example of this is the use of military personnel to provide mail services during the strike by postal employees in March 1970. Another example of the operation of the Economy Act is the use by President Franklin D. Roosevelt of the Army Air Corps in 1934 to transport the mails following the cancellation of air mail contracts.

b. Wartime. In addition to any authority the President and agencies of the federal government have under the Economy Act, during time of war the President is empowered to take possession of any system of transportation to transport troops and war materials and equipment, or for other purposes related to the emergency.[1100]

3-16. Public Safety and Rescue Operations

Military Assistance to Safety and Traffic (MAST). The MAST program is an interagency effort among the Departments of Transportation (DOT), Health and Human Services (HHS), and Defense (DOD). The program provides air ambulance/air rescue helicopters with crews, medical personnel, and medical equipment to designated civilian communities. DOD personnel, supplies, and equipment in the program must be kept in a continuous state of readiness in order to respond quickly and effectively to serious medical emergencies such as evacuation of accident victims, interhospital transfer of patients, the transfer of key medical personnel, and the transfer of blood and human organs.[1101]

a. MAST operational plan. Appropriate state and local officials develop an operating plan integrating the military resources provided under the MAST program into the emergency medical services

(EMS) system[1102] of the geographic area served by a MAST site.[1103] Coordination of local MAST operations is the responsibility of state and local officials, not the supporting military unit.[1104]

b. Approval authority. Final approval authority for each MAST mission rests with the local commander or his designee. The decision to accept or reject a request for a MAST mission must be based on aircraft availability, technical considerations, and unit mission requirements.[1105]

c. Procedures. Normally, MAST mission requests will be transmitted directly to MAST operations by a hospital official, law enforcement official, or other designated official approved by appropriate state and/or local officials or their representatives. Special equipment (such as a portable incubator or defibrillator) may be required for the safe evacuation of a patient or proper transportation of whole blood, biologicals, vital organs and the like. In such cases the donating

hospital is responsible for providing the necessary special equipment to the supporting MAST unit. Although the MAST pilot-in-command may assist in returning these items of special equipment, the MAST crew is not the responsible agency for the return of such equipment.[1106]

d. Competition with civilian ambulance services. MAST programs may not compete for emergency evacuation missions which can be accomplished by civil or commercial operators of ground or air ambulance services. If such non-military ambulance services are operating in the same geographic area covered by a MAST program, a letter of operational agreement must be negotiated between state and/or local officials or their representatives and their operators. In addition, the local military installation commander must be a signatory to this agreement.[1107] The essential contents of such an agreement are specified in AR 500-4.

e. Posse Comitatus Act considerations. The use of Army helicopters and crews for purposes of medical evacuation in support of the MAST Program is not a violation of the Posse Comitatus Act,[1108] but additional missions that might be assigned, such as traffic surveillance or the investigation of traffic accidents, would likely run afoul of the Act and should, therefore, be avoided. Any direct action by military personnel to pursue and apprehend traffic law violators is prohibited by the Act as is any direct assistance rendered to police officials in this regard.[1109] An otherwise lawful use of military personnel would not necessarily violate the Act, however, and it would be appropriate and lawful for military personnel to take over the direction of traffic for brief periods while conducting medical evacuation on highways.[1110] Similarly, transporting local or state police officials on board the helicopters would not violate the Act, even though these officials might be aided in their police

duties, if the primary purpose for transporting them was the rendering of medical aid or providing communication with other police units called to the scene of the accident.[1111]

f. Tort liability. MAST operations carry the potential for tort liability on the part of the federal government under the provisions of the federal Tort Claims Act,[1112] and Drivers Act,[1113] and liability on the part of the individual government agent or employee performing the rescue missions. Under these Acts the federal government assumes sole liability for the negligent acts of its employees acting within the scope of their employment[1114] and further provides that the remedies under the Act are the sole remedies available to the claimant.[1115] Many states have enacted so-called "Good Samaritan Statutes" that provide special rules of liability for persons who render emergency medical care at the scene of an accident or disaster. Under some of these statutes only physicians and nurses are

exempted from liability for their negligent acts in rendering such aid, while other states exempt anyone who renders such aid. Legal advisors should check their local law to determine whether their state has a "Good Samaritan Statute," and the nature of the protection under it, if one is available. In those states not having such statutes the standard principles of negligence will govern the liability of the United States and its agents.

3-17. Search and Rescue (SAR) Operations

a. Policy and responsibilities. The Armed Forces of the United States provide SAR support for their own operations. In addition, they have traditionally accepted, to the extent possible, a moral and humanitarian obligation to aid nonmilitary persons and property in distress. The Department of the Army makes Army resources available to support

the National SAR Plan, as required, on a noninterference basis with primary Army missions.[1116]

(1) Civil Air Patrol (CAP). The CAP, the world's largest inland volunteer civilian SAR organization, provides SAR services as an official auxiliary of the United States Air Force (USAF). The CAP is the primary SAR resource available to the civil sector.[1117]

(2) U.S. Air Force (USAF). The USAF is the responsible SAR coordinator for the inland area of the continental United States (except the inland area Alaska and waters under United States jurisdiction). The Commander, Aerospace Rescue and Recovery Service (ARRS), is the USAF Executive Agent for SAR operations in the inland region.[1118]

(3) U.S. Coast Guard (USCG). The USCG is the SAR coordinator for the maritime region, which is composed of the waters subject to United States jurisdiction, the state of Hawaii, United States

territories and possessions (except the Canal Zone), and the high seas.[1119]

(4) Unified commanders. Commanders of unified commands are the designated SAR coordinators for unified command areas overseas, including the inland area of Alaska.[1120]

(5) SAR mission coordinator. The SAR mission coordinator is the official designated by the SAR coordinator for coordinating and controlling a specific SAR mission.[1121]

(6) On-Scene commander. The on-scene commander is the official designated by the SAR mission coordinator for coordinating and controlling a specific SAR mission at the scene.[1122]

b. Concept of operations. FORSCOM acts as coordinator for all Army SAR support of the National SAR Plan within CONUS. Wartime SAR procedures and responsibilities are in AR 525-90. SAR operations outside CONUS are accomplished as determined by the appropriate unified command. Requests for Army SAR

assistance are transmitted to FORSCOM by the Air Force Rescue Coordination Center or the USCG Rescue Coordination Center. FORSCOM will in turn task the appropriate MACOM or Army installation to provide the required assistance. Upon receiving FORSCOM tasking, the installation SAR Coordinator will coordinate directly with the local civil SAR Coordinator or organization requiring assistance.[1123]

c. Recovery of human remains. Requests for SAR assistance to recover human remains require prior approval by HQDA (DAMO-ODS)[1124] unless:[1125]

(1) The recovery of human remains can be accomplished concurrently with the recovery of survivors, if such action does not jeopardize the survivors, or

(2) Overriding humanitarian conditions preclude obtaining prior approval.

In such cases where prior approval is not obtained, HQDA must be telephonically notified through appropriate SAR channels. In SAR operations

involving the recovery of human remains safety will be the primary consideration, and such assistance must be in accordance with local and state law.[1126]

3-18. Explosive Ordnance Disposal

a. Army responsibilities. The Army has explosive ordnance disposal (EOD) responsibility on landmass areas not specifically assigned as the responsibility of the Navy, Marine Corps, or Air Force. In addition, the Army is responsible as the primary point of contact for the U.S. Secret Service for all EOD support for Presidential and VIP protection.[1127]

b. Major Army commands. Commanders of Major Army commands with the exception of U.S. Army Training and Doctrine Command, U.S. Army Material Development and Readiness Command, and U.S. Army Communications Command, have been assigned certain EOD responsibilities. The more important of these

are: the establishment and operation of an EOD plan that will assure EOD service on a 24-hour basis in accordance with AR 75-15 and AR 75-14; providing EOD assistance and coordination at each command echelon with other U.S. departments, agencies, and civil authorities having EOD or reconnaissance responsibilities; and, the establishment of EOD responsibilities for local commanders, to include necessary civil affairs liaison with civilian officials.[1128]

c. Disposal of military explosives.

(1) On U.S. property. The first commander who becomes aware of an actual or potential explosive ordnance incident occurring on U.S. government property is required to take immediate action to secure the area, evaluate the danger and take necessary protective and evacuation measures, report the incident through established incident reporting channels, provide assistance as may be required in support of EOD operations (to include

movement of EOD personnel to the incident site by the most rapid transportation mode available), and to establish liaison with civil authorities to ensure effective discharge of civil affairs responsibilities.[1129]

(2) Off U.S. property. For EOD incidents outside of U.S. government property involving ordnance belonging to the U.S. government, the local commander, through coordination with civil authorities, will take action as if the EOD incident were occurring on U.S. government property.[1130]

d. Disposal of nonmilitary explosives. For EOD incidents involving nonmilitary commercial explosives or dangerous articles, the local commander may provide assistance when requested by federal agencies or civil authorities in the interest of preserving public safety. When delay in responding to such a request would endanger life or cause injury, commanders may authorize assistance to the extent necessary to prevent injury or death.

EOD personnel may act as technical consultants or advisors, or they may perform render safe and disposal procedures if requested.[1131]

(1) Liability. Responsibility and liability connected with responding to and disposing of nonmilitary commercial-type explosives, chemicals or dangerous articles remains with the requestor.[1132]

(2) Referral to National Response Center (NRC) Civil authorities requesting assistance for accidents and incidents involving nonmilitary commercial chemicals must be referred to the NRC (telephone number toll free (800) 424-8802 or (202) 426-1830). When delay would endanger life or cause injuries, commanders may authorize assistance necessary to prevent injury or death.[1133]

(3) Limitations on the use of EOD personnel. EOD personnel are not permitted to receive, transport, or dispose of commercial hazardous material until positive identification has been made and specific instructions and authorizations are

provided by the NRC or Army Operations Center (AOC).[1134] Pending receipt of such specific instructions, the actions of EOD personnel normally will be limited to those emergency actions necessary to reduce hazards to life and property, such as recommending evacuation procedures and distances, leak-sealing, etc.[1135]

Appendix A Memorandum of Understanding Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation. Subject Use of Federal Military Force in Domestic Terrorist Incidents

A-1. Purpose

This memorandum sets forth the responsibilities of the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Department of Defense (DOD); and the procedures to be followed by each of these agencies with respect to the use of military force in a domestic terrorist incident. These procedures are based on the Interdepartmental Action Plan for Civil Disturbances, dated April 1, 1969.

A-2. Responsibilities

The responsibility for the management of the Federal response to acts of terrorism in the United States rests with the Attorney General. As the chief law enforcement officer of the Federal Government, the Attorney General coordinates all Federal Government activities during a major terrorism crisis and advises the President as to whether and when to commit military forces in response to such a situation. Within the Department of Justice the lead agency for the operational response to a terrorist incident is the FBI. The initial tactical response to such incidents is made by the FBI Special Agent in Charge (SAC) at the scene, under the supervision of the Director of the FBI, who has overall responsibility for ongoing operations to contain and resolve the incident.

All military preparations and operations, including the employment of military forces at the scene of a terrorist incident, will be the primary responsibility of the Secretary of Defense. In discharging these functions, he will observe such

law enforcement policies as the Attorney General may determine. To the extent practical, such law enforcement policies will be formulated during the early stages of the terrorist incident to insure that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this memorandum will be carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for such matters as DOD Executive Agent.

A-3. Responding to Early States of a Terrorist Incident

The Department of Justice will immediately notify DOD when a terrorist incident has occurred with potential for military involvement and will keep DOD advised of developments. The Department of Defense may dispatch military observers to the incident site upon mutual agreement by DOD and FBI to appraise the situation before any decision is made to commit federal military forces. Although the Posse Comitatus Act does not permit military personnel to actively engage in the law enforcement mission unless expressly authorized, the Act does not prohibit military observers from reporting to the Department of Defense; nor does it generally prohibit the preparation of contingency plans for lawful military intervention; advice to civilian officials; sharing intelligence information collected during the normal course of military operations, including operations relating to the

incident; the loan of specialized equipment or weaponry; the use of military personnel to deliver and maintain equipment for civilian use, provided those personnel do not operate that equipment;* or the use of military personnel to train civilian law enforcement officials in the operation and maintenance of military equipment. See 10 U.S.C. ✍✍ 371-78 (Supp. 1981); DOD Directive 5525.5, "DOD Cooperation with Civilian Law Enforcement Officials," 47 Fed. Reg. 14899 (April 7, 1982). Application of the Posse Comitatus Act may differ depending on the particular factual situation presented, and advice should be obtained whenever possible from appropriate officials.

Precautionary steps, such as the prepositioning of troops near the incident site may be undertaken with the approval of the DOD and the SAC.

* In the event the incident involves certain violations of federal law relating to controlled substances, immigration and nationality matters, or tariff and customs offenses, additional authority may be available permitting the use of military personnel to operate and maintain military equipment. See 10 U.S.C. ✍374 (Supp. 1981).

Prepositioning must, of course, be undertaken with discretion. The prepositioning of more than a battalion-sized unit (approximately 500 men) by order of the Secretary of Defense will be undertaken only with the informal approval of the President. Such approval will be sought by the Attorney General, and, ordinarily, only if there appears to be a substantial likelihood that such forces will be required.

When the SAC anticipates that federal military assistance will shortly become necessary he will promptly notify the Director, who will advise the Attorney General. After consultation with the Director of the FBI and the Secretary of Defense on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant employment of military forces at that particular time. The FBI shall disseminate information concerning the incident and its participants to military authorities as though such

authorities were operating in a law enforcement capacity. Such information may be retained by appropriate military components in accordance with procedures agreed upon by the Department of Justice and the Department of Defense.

A-4. Employment of Military Forces

If the President decides to approve the use of military force, the Attorney General will, where necessary, furnish the President with an appropriately drawn proclamation and executive order, or other documents needed to implement his decision. Although the Attorney General has statutory authority to request the assistance of military forces for certain law enforcement purposes, military forces will not be committed in such circumstances without presidential approval.

When the use of military force is approved, the Secretary of Defense will conduct the military operation subject to law enforcement policies

determined by the Attorney General. The Secretary of the Army, as Executive Agent for the Secretary of Defense, is responsible for the necessary military decisions and for issuance of the appropriate orders to the Military Task Force Commander. The established law enforcement policies may require revision or elaboration during the actual military operation; in that event, the Secretary of the Army will refer such matters, military exigencies permitting, to the Attorney General, with his recommendation.

The Attorney General through the FBI will remain responsible for: (1) coordinating the activities of all federal agencies assisting in the resolution of the incident and in the administration of justice in the affected area, and (2) coordinating these activities with those State and local agencies similarly engaged.

Upon notification of a presidential approval to use military force, the Attorney General will advise the Director of the FBI who will notify the SAC; the Secretary of Defense will advise the Military Task Force Commander. The Military Commander and the SAC will coordinate the transfer of operational control to the Military Commander.

Responsibility for the tactical phase of the operation is transferred to military authority when the SAC relinquishes command and control of such operation and it is accepted by the on-site Military Task Force Commander. However, the SAC may revoke the military commitment at any time prior to the assault phase if he determines that military intervention is no longer required, provided that the Military Commander agrees that a withdrawal can be accomplished without seriously endangering the safety of military personnel or others involved in the operation. The Military Commander may utilize FBI personnel as hostage negotiators, translators,

sniper/observors, and in other similar support roles, but FBI personnel may not participate in the tactical assault unless expressly authorized by the SAC.

When the Military Task Force Commander determines that he has completed the assault phase of the operation, command and control will be promptly returned to the SAC.

A-5. Post Incident Responsibilities

Upon termination of the incident and return of command to the FBI, all military personnel will be evacuated immediately to a relocation site mutually agreed upon by the SAC and the Military Commander. However, certain key military personnel may be requested to remain briefly at the site if the SAC determines that their continued presence is necessary to protect the integrity of the investigative process. The FBI will make every

reasonably effort to expedite interviews of military personnel and will afford such constitutional and procedural safeguards, including the presence of military counsel, as may be appropriate to the inquiry. To the extent permitted by law, the FBI will protect the identity of such personnel and any sensitive methods or techniques used during the operation from public disclosure. All such information will be handled in accordance with the classification level established by the military and with the requirements of Executive Order 12356 or any successor Order or regulations, where appropriate. In addition, procedures will be established to insure that any forensic examinations of weapons or other equipment used by military personnel that may be necessary will be conducted as expeditiously as possible.

A-6. Terrorist Incidents on a Military Reservation

The respective roles of the Defense Department, the Justice Department and the FBI with respect to a terrorist incident on a military reservationare essentially the same as described in Section II above. However, the installation commander is responsible for the maintenance of law and order on a military reservation and may take such immediate action in response to a terrorist incident as may be necessary to protect life and property. The FBI will be promptly notified of all terrorist incidents and will exercise jurisdiction if the Attorney General or his designee determines that such incident is a matter of significant federal interest. Unless otherwise specified, the SAC of the appropriate region acting under the supervision of the Director shall be the Attorney General's designee in such matters. The Attorney General may request military assistance without presidential approval in such circumstances, but such assistance shall be furnished in a manner consistent with the provisions of this memorandum of understanding. If the FBI

declines to exercise its jurisdiction, military authorities will take appropriate action to resolve the incident.

Nothing in this section affects the investigative responsibilities of the military departments or the FBI as set forth in the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments have Concurrent Jurisdiction," dated July 19, 1955.

A-7. Funding

All Department of Defense assistance provided to the Department of Justice under the provisions of this Memorandum will be on a reimbursable or reclaimable basis in accordance with the Economy Act, 31 U.S.C. ✍✍1535-36 or regulations promulgated by the Secretary of Defense pursuant to 10 U.S.C. ✍377, through DOD Executive Agent, the Department of the Army.

Standard pricing will be used to the maximum extent possible including the cost of the additional personal services of military and civilian personnel in accordance with the DOD Accounting Guidance Handbook for Billing Federal, non-DOD agencies. Reimbursement will also include incremental costs, meaning such costs which would not have been incurred in the absence of the incident.

A-8. Terms of Agreement

This Agreement will become effective immediately upon signature by all parties and shall continue in effect unless terminated by any party upon notice in writing to all other parties.

Amendments or modifications to this agreement may be made upon written agreement by all parties to the agreement.

_____

John O. Marsh, Jr. Date

Secretary of the Army

_____

Jeffrey Harris Date

Acting Associate Attorney General

U.S. Department of Justice

_____

William H. Webster Date

Director

Federal Bureau of Investigation

ENDNOTES

1. The Constitution provides:

> The Congress shall have Power To . . . provide for the common Defense . . .;
> To declare War, . . .;
> To raise and support Armies, . . .; To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> To provide for calling forth the Militia . . .;
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . .; and
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. [Art I, j 8.]
> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . [Art II, j 2.]

2. 10 U.S.C. ✍3013(b).

3. 3 U.S.C. ✍301. This statute requires a formal written authorization published in the Federal Register.

4. 3 U.S.C. ✍302.

5. Id.

6. See Dunmar v. Ailes, 348 F.2d 51, at 55 (D.C. Cir. 1965).

7. See Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839).

8. Note that Congress has recognized and avoided limiting the alter ego doctrine. See 3 U.S.C. ✍302.

9. See 10 U.S.C. ✍133(d), 3012.

10. See, e.g., 10 U.S.C. ✍133(b) (authority, direction, and control over the Department of Defense).

11. 10 U.S.C. ✍3012(c).

12. E.g., 10 U.S.C. ✍672 (authority to order Reserves to active duty).

13. See, e.g., 10 U.S.C. ✍3362(g). (Reserve promotions).

14. 10 U.S.C. ✍121.

15. 10 U.S.C. ✍3061.

16. 5 U.S.C. ✍301.

17. 10 U.S.C. ✍3013(g)(3).

18. 10 U.S.C. ✍3013(g)(1).

19. AR 600-20, Army Command Policy and Procedures, para. 1-4.

20. A chaplain has rank without command. 10 U.S.C. ✍3581. An officer in the Medical Department is not generally entitled to exercise command except within

the Medical Department. 10 U.S.C. ✍750 (1982). Retired officers may not exercise command except when on active duty. 10 U.S.C. ✍750.

21. See AR 600-20, paras. 3-11, 3-12.

22. AR 600-20, para. 1-6.

23. AR 600-20, para. 2-1.

24. E.g., commanders are authorized by statute to administer nonjudicial punishment to members of their commands. 10 U.S.C. ✍815.

25. E.g., commanders are authorized by regulations to take specific actions relating to the elimination of enlisted members. AR 635-200, Enlisted Personnel.

26. See Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, at 892-3 (1961).

27. A permanent installation is a fort and a temporary installation is a camp. AR 210-10, para. 1-4. See also AR 310-25, para. 10. AR 210-10, para. 1-4 provides that the Secretary will name all permanent installations although authority to name U.S. Army Reserve Centers and portions of military installations has been delegated.

28. AR 10-5, para. 2-34.

29. See generally AR 10-5, para. 2-34; AR 405-10 (acquisition of property); AR 405-20 (legislative jurisdiction); AR 405-25 (annexation); AR 405-80 (granting use of property); AR 405-90 (disposing of property). The Corps of Engineers carries out many

of these functions and responsibilities through geographically designated divisions and districts.

30.The Judge Advocate General performs these functions through the Administrative Law Division, which considers most legal questions concerning military installations, the Contract Law Division, which reviews legal matters pertaining to taxation of military property, and the Regulatory Law Office, which considers issues pertaining to public utility services to installations. See Judge Advocate General Reg. 10-1, Organization and Functions - Office of The Judge Advocate General (13 Jun. 1989).

31.Van Brocklin v. Anderson, 117 U.S. 151 (1886); United States v. Board of Comm'rs, 145 F.2d 329 (10th Cir. 1944).

32.U.S. Const. art. IV, ✍3, cl. 2 provides: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

33. 41 U.S.C. ✍14 provides: "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

34.10 U.S.C. ✍2676. Other statutes restricting the power of the military departments over lands are 42 U.S.C. ✍1594 (contracting for construction or lease of family housing), and 41 U.S.C. ✍12 (erection, repair or furnishing of buildings).

35.10 U.S.C. ✍2677. Up to 12% of the appraised fair market value may be paid for an option. Periodic reports of options obtained must be made to the House and Senate Armed Services Committees.

36.10 U.S.C. ✍2672. This authority does not apply to purchase of contiguous multiple parcels of land as part of the same project where each costs less than $200,000 but together would exceed $200,000.

37. 10 U.S.C. ✍2662. For other reporting requirements to Congress, see infra note 41.

38.10 U.S.C. ✍2662(a)(4).

39.See generally 10 U.S.C. ✍✍2801-2863.

40.10 U.S.C. ✍2805. See also AR 415-35.

41.10 U.S.C. ✍2805.

42.10 U.S.C. ✍2805(b)(1).

43.Id.

44.AR 405-10, para. 1-5a, does not permit acquisition of permanent property interests from outside the military departments unless the activity to be accommodated is mission essential, existing Army property is inadequate, and other Federal property is either inadequate or unavailable for use on a permit or joint use basis.

45.See AR 405-10, para. 1-5b(1).

46.See 10 U.S.C. ✍2663(d) (fortifications, training camps, munitions plants); 10 U.S.C. ✍4771 (training camps, airfields).

47.10 U.S.C. ✍2601(a). The statute is implemented by AR 1-100. AR 1-100, para. 6(a) provides instructions on processing of conditional real property gifts.

48.See United States v. Burnison, 339 U.S. 87 (1950) (State has power to prohibit succession of United States to realty devised by will). See also Succession of Shepard, 156 So. 2d 287 (La. App. 1963).

49.AR 405-10, para. 1-5b(1).

50.See 41 C.F.R. 101-47.203-1.

51.AR 405-10, para. 1-5a(2).

52.AR 405-10, para. 1-5a(3).

53.Id. A permit is in the nature of a license for use granted by one department to another. AR 405-10, para. 1-4f. Obtaining use of another agency's land by permit is undesirable for both agencies involved. The using agency does not have complete control of the land and any improvements made for that agency's benefit will be lost when the land is returned to the other agency. The permitting agency is also at a disadvantage because it cannot require the using agency to restore the land to its original condition before return. For example, where the National Park Service granted a permit to the Army to use a national forest for training purposes, it could not require the Army to repair roads and related facilities when the property was returned. 44

Comp. Gen. 693 (1965). See also 32 Comp. Gen. 179 (1952); 31 Comp. Gen. 329 (1952). Moreover, because title to property is in the United States rather than in individual agencies, one agency cannot lease or convey its property to another. Nor is it possible to lease land under Army control to another Federal instrumentality, such as a nonappropriated fund instrumentality. An exception is a lease between the agency and wholly owned Government corporations. E.g., 20 Comp. Gen. 699 (1941) (Post Office Department required to pay rent to Reconstruction Finance Corporation).

54.AR 405-10, para. 2-3b. 10 U.S.C. ✍2571(a) provides that property can be transferred between the military departments without reimbursement.

55.AR 405-10, para. 1-5b(3). AR 405-10, para. 1-4g and 1-4h explains that recapture is the retaking of realty formerly owned by the United States disposed of under a "national security," "national emergency," or "national defense purpose" clause, which provides that in the event of specifically described circumstances, the United States may reenter and use the land. See, e.g., Act of June 1, 1955, chap. 112, 69 Stat. 70 (conveying property to Iowa for National Guard use but providing for reentry and use of the land by the United States during any declared war or national emergency). A reverter or recapture clause does not operate automatically. See United States v. Northern Pacific Ry. Co., 177 U.S. 435 (1900) (reverter does not take effect until actual reentry on the land or congressional action). Agencies are advised to inform the Attorney General or Congress when the United States is entitled to exercise its rights under clauses requiring reversion. 41 Op. Att'y Gen. 311 (1957); 16 Op. Att'y Gen. 250 (1879).

56.H.R. Rep. No. 857, 85th Cong., 1st Sess. 6 (1957). Of the 1.4 billion acres of which the public domain originally consisted, over one billion acres have been conveyed. Id. At statehood many territorial lands were reserved by the Government for military use. See, e.g., Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 839 (ceding all lands in Alaska to the State except for property required for specific Federal purposes). See also Hawaii v. Gordon, 373 U.S. 57 (1963) (suit by Hawaii based on power vested in the Federal Government under the statehood act to set aside some lands for Federal use).

57.This power has been delegated to the Secretary of the Interior. Exec. Order No. 10,355, 3 C.F.R. 873. No executive official can

of his or her own authority reserve public lands. United States v. Hare, 26 F. Cas. 139 (C.C.D. Cal. 1867) (No. 15,303).

58.See 43 U.S.C. ✍2.

59.7 Op. Att'y Gen. 571 (1885). With respect to the authority of the President to act on behalf of Congress to set aside public lands, see Grisar v. McDowell, 73 U.S. (6 Wall.) 363 (1868); Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942). The President also has authority to transfer reserved public lands between executive departments. 37 Op. Att'y Gen. 431 (1934); 37 Op. Att'y Gen. 417 (1934); 33 Op. Att'y Gen. 436 (1923).

60.43 U.S.C. ✍156.

61.40 U.S.C. ✍472(d).

62.43 U.S.C. ✍158.

63.33 Op. Att'y Gen. 288 (1922).

64.40 U.S.C. ✍483(a). When a military department reports land as excess, a report must be made to Congress when the land is worth more than $200,000. 10 U.S.C. ✍2662(a)(5).

65.See Fed. Prop. Management Regs., 41 C.F.R. 101-1.100 et seq.

66.AR 405-10, para. 1-5b(7) lists purchase, lease, and condemnation together as the least preferred methods of acquiring real estate. Para. 1-5f provides that obtaining title or a leasehold interest is justified when the function to be accommodated is essential and locating the function on non-Federal land is essential to the mission such as where the recruiting function is involved. Para. 1-5h further provides that title to land should generally be required when permanent construction will be placed on the property.

67.See Foster v. United States, 607 F.2d 943 (Ct. Cl. 1979); Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

68.See supra note 11.

69.10 U.S.C. ✍2672a.

70.Authority to acquire land must be specifically provided. An act authorizing a public improvement for which funds are appropriated but that does not also expressly provide for acquisition of the land is insufficient authority for the land purchase. Ms. Comp. Gen. B-115456 (16 July 1953).

71.40 U.S.C. ✍255 permits the Attorney General to delegate responsibility to certify the validity of title. The Corps of Engineers is the delegee for Army property. Order of Att'y Gen. 440-70, Oct. 2, 1970. There is some authority that certification is unnecessary for reserved public lands and lands to which 40 U.S.C. ✍255 does not arguably apply. See Dig. Ops. JAG 1912-1940 ✍994(1) (20 Oct. 1937).

72.10 U.S.C. ✍2828.

73.10 U.S.C. ✍2675.

74.The Administrator of General Services may lease property for up to 20 years. 40 U.S.C. ✍490(h). General responsibility for Government leasing was vested in the Administrator of General Services by Reorg. Plan No. 18 of 1950, 15 Fed. Reg. 3,177, reprinted in 40 U.S.C.S. note at 210 (1978), and in 64 Stat. 1270 (1950). 41 C.F.R. 101-18.101. See also AR 405-10, para. 2-14a.

75.41 C.F.R. 101-18.102(a). See also AR 405-10, para. 14a(2)(a).

76.AR 405-10, para. 2-14a(2)(a).

77.41 C.F.R. 101-18.104(a). See also AR 405-10, para. 2-14a(2)(e).

78. AR 405-10, para. 2-11.

79.40 U.S.C. ✍257.

80.40 U.S.C. ✍258a.

81.See Filbin Corp. v. United States, 26 F. 911 (E.D.S.C. 1920) (comparing the term "requisition" to "condemnation").

82.See United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851); In re Inland Waterways, 49 F. Supp. 675 (D. Minn. 1943).

83.343 U.S. 579 (1952).

84. See 50 U.S.C. App. 468(c); 10 U.S.C. ✍2538. See, e.g., Act of Nov. 4, 1918, chap. 201, 40 Stat. 1029; ✍✍601, 602, Act of Mar. 27, 1942, chap. 199, 56 Stat. 181; ✍201, Defense Production Act of 1950, chap. 932, 64 Stat. 799.

85.United States v. McFarland, 15 F.2d 823 (4th Cir. 1926), cert. revoked, 275 U.S. 485 (1926).

86.Duckett & Co. v. United States, 266 U.S. 149 (1924).

87.Gates v. Goodloe, 101 U.S. 612 (1880).

88.Alpirin v. United States, 113 F. Supp. 681 (Ct. Cl. 1953).

89.West v. United States, 73 Ct. Cl. 201 (1931).

90.A. J. Hodges Indus., Inc. v. United States, 355 F.2d 592 (Ct. Cl. 1966); Jensen v. United States, 305 F.2d 444 (Ct. Cl. 1962). Cf. Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964), holding that damage to property from testing jet engines on an adjoining Air Force base did not constitute a "taking" as it did not "deprive" the owner of all or most of his interest in the subject.

91.In Boardman v. United States, 376 F.2d 895 (Ct. Cl. 1967), the court held that an aviation easement had existed since 1955, and a suit filed in 1963 was barred by the statute of limitations.

92.147 U.S. 508 (1893).

93.Id. at 516.

94.JAGR 1947/9323 (18 Feb. 1948).

95.See, e.g., Andros v. Rupp, 433 F.2d 70 (9th Cir. 1970) (remand to district court to determine whether United States could demonstrate ownership by adverse possession based on Stanley). See also 35 Comp. Gen. 2 (1955) (Government can acquire prescriptive easement by unmolested, open, and continuous use for 20 years); Nature Conservancy v. Machipongo Club Inc., 419 F. Supp. 390 (E.D. Va. 1976).

96.Title is different from control, which an agency may exercise. Note that the Department of Defense does not control property.

The Secretary of Defense designates the military departments to control property. 10 U.S.C. ✍2682.

97.40 U.S.C. ✍258f.

98. 40 U.S.C. ✍255.

99.AR 405-10, para. 2-16.

100.Id.

101.Id. and para. 1-4j.

102.United States v. Chartier Real Estate Co., 226 F. Supp. 285 (D.R.I. 1964).

103.218 F. Supp. 809 (E.D.N.C. 1963).

104.Dig. Ops. JAG 1912 Public Property 195 (27 Oct. 1898). Note that general or long-term outleasing may place the title in jeopardy.

105.The United States has the rights of a proprietor in lands belonging to it, including the power to sell them or withhold them from sale. Camfield v. United States, 167 U.S. 518 (1897). In leasing property to third parties, the Government acts in its proprietary rather than in its governmental capacity. United States v. Blumenthal, 315 F.2d 351, 353 (3d Cir. 1963).

106.The determination preliminary to the grant of a lease, license, permit, or easement is that the property is available for non-Army use. AR 405-80, para. 2-1. Where the property is to be sold or otherwise disposed of, a determination must first be made that the property is "excess." AR 405-90, paras. 2-6.

107. AR 405-90, para. 1-4e.

108.AR 405-80, para. 1-4a(3).

109.AR 405-90, paras. 1-4b.

110.AR 405-80, para. 1-4.

111.AR 405-80, paras. 1-4b, 1-4c, 2-28, 2-30, 2-38.

112.AR 405-80, paras. 2-29, 2-33, 2-36, 2-39, 2-40, 2-42, 2-46.

113. See 43 U.S.C. ✍959; 16 U.S.C. ✍461-467; 23 U.S.C. ✍317; 16 U.S.C. ✍797; 42 U.S.C. ✍2097; 40 U.S.C. ✍310.

114.AR 405-80, para. 2-9.

115.20 Op. Att'y Gen. 93 (1891); 13 Op. Att'y Gen. 46 (1869); 15 Comp. Gen. 169 (1934).

116.United States v. Thompson, 98 U.S. 486 (1878); United States v. Kellum, 523 F.2d 1284 (5th Cir. 1975).

117.Lindsay v. Miller, 31 U.S. (6 Pet.) 666 (1832); Hernik v. Director of Highways, 169 Ohio St. 403, 160 N.E.2d 249 (1959).

118.10 U.S.C. ✍2662(a)(3).

119.AR 405-80, para. 3-15. See supra note 29.

120.AR 405-80, para. 1-3.

121.AR 405-80, para. 3-16.

122.AR 405-80, para. 2-30.

123. AR 405-80, para. 3-17.

124.AR 405-90, para. 1-4b.

125.AR 405-80 is entitled "Granting Use of Real Estate" but includes transactions where a property interest is actually granted, such as leases and easements. AR 405-90, on the other hand, entitled "Disposal of Real Estate," includes transfer of property to other agencies, although title is not disposed. AR 405-90 also defines "disposal" as "any . . . method of permanently divesting DA of control of and responsibility for real estate" rather than divesting of title.

126.Chap. 288, 63 Stat. 377, codified at 40 U.S.C. ✍471-544.

127.AR 405-90, para. 4-1.

128.40 U.S.C. ✍483(a).

129.10 U.S.C. ✍2571(a).

130.10 U.S.C. ✍2662(a)(3).

131.16 U.S.C. ✍505a.

132.AR 405-80, para. 2-36.

133.AR 405-80, para. 1-3; 35 Op. Att'y Gen. 485, 489; 22 Comp. Gen. 563.

134.See AR 405-80, para. 3-9.

135.Only the Secretary of the Interior may grant permission with the consent of the Secretary of Defense to explore for minerals on military property that has been reserved or set aside from the public domain. See 30 U.S.C. ✍352; AR 405-80, para. 2-21.

136.AR 405-80, para. 2-46.

137. AR 405-80, para. 2-30.

138. AR 405-80, para. 2-31.

139.AR 405-80, para. 2-15; 16 U.S.C. ✍432.

140.AR 405-80, paras. 2-24, 2-25. See 10 U.S.C. ✍2670, 4778.

141.AR 405-80, para. 2-26. See 32 U.S.C. ✍503.

142.43 U.S.C. ✍961.

143.AR 405-80, para. 2-38.

144.Id. at para. 2-28.

145.Installation commanders generally can issue any license "incidental to post administration" to the extent that the activity is not otherwise addressed in AR 405-80. AR 405-80, para. 2-36.

146.Id. at para. 2-27.

147.Id. at para. 2-39.

148.Id. at para. 2-24.

149.Id. at para. 2-32. Making property available for the use of exchanges and other nonappropriated funds does not really constitute a license but mere assignment of space to Army instrumentalities. See generally AR 60-10.

150.AR 405-80, para. 2-35. See generally AR 420-74.

151.AR 405-80, para. 2-29.

152.Id. at para. 2-45. See generally AR 210-50.

153.AR 405-80, para. 2-46.

154.Id. at para. 2-47.

155.Id. at para. 2-42. See 12 U.S.C. ✍1770.

156.43 U.S.C. ✍158.

157.23 U.S.C. ✍317.

158.16 U.S.C. ✍797.

159.AR 405-80, para. 3-1.

160.Tips v. United States, 70 F.2d 525 (5th Cir. 1934).

161.10 U.S.C. ✍2667. Other statutory authority to lease Army property is described in 16 U.S.C. ✍460d (leases for park, recreational, and other purposes in reservoir areas on military reservations). There is no limitation on the term of such leases.

162.Subsection (b)(4) permits maintenance, protection, repair, or restoration of the premises to be accepted as part or all of the consideration of the lease. This is an exception to the provisions of the Economy Act of 1932, 40 U.S.C. ✍303b, which provides: "[e]xcept as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. . . ."

163.See AR 405-80, para. 3-3.

164.AR 405-80, para. 3-2.

165.AR 405-80, para. 2-7c(5).

166.10 U.S.C. ✍2662(a)(3). AR 405-90, para. 2-5d, carries forward the $100,000 limit under the predecessor statute.

167.36 Op. Att'y Gen. 282 (1930).

168. 41 U.S.C. ✍15 prohibits the transfer of any interest in Government contracts. However, since this is intended to benefit the Government and since the Military Leasing Act does not specifically prohibit subleasing, there appears to be no bar to subleasing. See AR 405-80, para. 3-6 for restrictions on subleasing.

169.AR 405-80, para. 3-4.

170.36 Op. Att'y Gen. 462 (1931).

171.315 F.2d 351 (3d Cir. 1963).

172.Id. at 353. See also Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955) (distinguish on the ground that the "Government did give a specific reason, which the court held to be an invalid one").

173.AR 405-80, para. 2-45.

174.AR 405-80, para. 2-23.

175.See AR 405-80, chap. 3, ✍III.

176.43 U.S.C. ✍961.

177.10 U.S.C. ✍2669.

178.10 U.S.C. ✍2668.

179.10 U.S.C. ✍4777.

180.33 U.S.C. ✍558b, 558b-1.

181.43 U.S.C. ✍946, 959.

182.23 U.S.C. ✍317. Also, under 23 U.S.C. ✍107(d) the Army cooperates with the Department of Transportation by granting controlled-access easements to States.

183.AR 405-80, para. 3-11.

184.Id. paras. 3-12, 3-13.

185.40 U.S.C. ✍471-544.

186.AR 405-90, Glossary, ✍II.

187.Id. at para. 2-6.

188.41 C.F.R. 101-47.601.

189.AR 405-90, chap. 6.

190.AR 405-90, para. 1-4.

191.Id. at para. 4-3.

192.Id. at para. 6-2.

193. 40 U.S.C. ✍471-544.

194.See U.S. Const. art. I, ✍8, cl. 17. Note that the term used is "legislation," not "jurisdiction": "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same Shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ."

195.Among the independent grants of authority given Congress by the Constitution are the power to regulate interstate commerce, the power to declare war, and the power to make rules for the Government and regulation of the land and naval forces. See U.S. Const. art. I, ✍8.

196. The United States does not exercise any type of legislative jurisdiction over about 95% of the land it owns. General Services

Administration, Inventory Report on Jurisdictional Status of Federal Areas Within the States as of June 30, 1957, 11 (Nov. 10, 1959).

197.North American Commercial Co. v. United States, 171 U.S. 110 (1898).

198.This classification is taken from Att'y Gen., Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States 10, 11 (Part II, 1957). [Hereafter cited in this Chapter as Report]. It can also be found in AR 405-20, paras. 3, 4.

199.Act of Mar. 2, 1795, chap. 40, ✍1, 1 Stat. 426, provided that State reservations of the right to serve process on some kinds of lands would not invalidate a cession of exclusive jurisdiction over those lands. As to any kind of land, the Supreme Court has held: "There is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another State to execute its process within its limits." United States v. Cornell, 2 Mass. 60, cited in Fort Leavenworth Railroad v. Lowe, 114 U.S. 525, 534 (1885). See also United States v. Knapp, 26 F. Cas. 792 (S.D.N.Y. 1849) (No. 15,538); United States v. Davis, 25 F. Cas. 781 (C.C.D. Mass. 1892) (No. 14,930); United States v. Cornell, 25 F. Cas. 646 (C.C.D.R.I. 1819) (No. 14,867); United States v. Travers, 28 F. Cas. 204 (C.C.D. Mass. 1814) (No. 16,537).

200.State or local fire, police, and sanitation services, and rights incident to residence or domicile such as the attendance at State or local schools, and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarization, and inquests may be denied residents of exclusive jurisdiction areas. AR 405-20, para. 4. See infra para. 2.10.

201.AR 405-20, paras. 4, 5.

202.Id. at para. 6.

203. Iowa Code Ann. ✍1.4.

204. Minn. Stat. Ann. ✍1.041.

205. Va. Code ✍7.1-18.1.

206.For a statement as to the responsibilities of the Corps of Engineers in providing acquisition maps, marking boundaries, and conducting surveys, see AR 405-10, para. 2-19.

207.For example, AR 215-2, paras. 3-30 and 3-31, provide that bingo games and Monte Carlo nights may be held on exclusive jurisdiction installations and other installations where gaming is allowed by the State or host country.

208.218 U.S. 245 (1910). See also Markham v. United States, 215 F.2d 56 (4th Cir. 1954); Act of Feb. 1, 1940, chap. 18, 54 Stat. 19 (codified at 33 U.S.C. ✍733, 40 U.S.C. ✍255, 50 U.S.C. ✍175).

209.218 U.S. at 252.

210.240 F.2d 122 (5th Cir.), cert. denied, 353 U.S. 915 (1957).

211.Id. at 127.

212.Id. at 129.

213.See supra para. 2-3.

214.Id.

215.See Brown v. United States, 257 F. 46, 51 (5th Cir. 1919), rev'd on other grounds, 256 U.S. 335 (1921). Courts will take judicial notice of facts that vest the United States with exclusive jurisdiction. Hudspeth v. United States, 223 F.2d 848 (5th Cir. 1955). Also, administrative interpretations by Government officials in this area are given great weight. Bowen v. Johnston, 306 U.S. 19 (1939). See also Vincent v. General Dynamics Corp., 427 F. Supp. 786 (N.D. Tex. 1972).

216.U.S. Const. art. IV, ✍3, cl. 2. (The Property Clause).

217.Cf. Puerto Rico v. Esso Standard Oil Co., 332 F.2d 624 (1st Cir. 1964).

218.U.S. Const. art. I, ✍8, cl. 17.

219.See 12 Op. Att'y Gen. 428 (1868) (consent of the State constitutional convention is insufficient to effect transfer of jurisdiction to the United States).

220.United States v. Tucker, 122 Fed. 518 (W.D. Ky. 1903).

221.James v. Dravo Contracting Co., 302 U.S. 134 (1937); Silas Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937); Holt v. United States, 218 U.S. 245 (1910).

222.39 Op. Att'y Gen. 99 (1937).

223.Humble Pipe Line Co. v. Waggoner, 376 U.S. 369 (1964); Rodman v. Pothier, 285 F. 632 (D.R.I. 1923), aff'd, 264 U.S. 399 (1924); Mississippi River Fuel Corp. v. Fontenot, 234 F.2d 898 (5th Cir.), cert. denied, 352 U.S. 916 (1956) (question raised but decision based on other grounds).

224.Humble Pipe Line Co. v. Waggoner, 375 U.S. 369 (1964); United States v. Tucker, 122 F. 518 (W.D. Ky. 1903). But cf. Silas Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937).

225.United States v. Tierney, 28 F. Cas. 159 (C.C.S.D. Ohio 1864) (No. 16,517).

226.Ex parte Hebard, 11 F. Cas. 1010 (C.C.D. Kan. 1877) (No. 6,312).

227.U.S. Const. art, I, ✍8, cl. 17.

228.New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818). See also 26 Op. Att'y Gen. 289, 297 (1907); 38 Op. Att'y Gen. 185 (1935).

229.302 U.S. 134 (1937).

230.Id. at 142-3. Not every Federal holding is a "building." Forests, parks, ranges, wild life sanctuaries, flood control, and similar holdings, apparently would not be covered by the term. Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

231.See In re O'Connor, 37 Wis. 379 (1875); United States v. Railroad Bridge Co., 27 F. Cas. 686, 692 (C.C.N.D. Ill. 1855) (No. 16,114).

232.Ga. Code Ann. chap. 15-3 (1971). These sections are representative of consent and cession laws.

233.114 U.S. 525 (1885).

234.Id. at 540-2. The cession method has been recognized in many subsequent decisions. Paul v. United States, 371 U.S. 245 (1963); Bowen v. Johnston, 306 U.S. 19 (1939); Collins v. Yosemite Park Co., 304 U.S. 518 (1938); Standard Oil Co. of California, 291 U.S. 242 (1934); Battle v. United States, 209 U.S. 36 (1908); Benson v. United States, 146 U.S. 325 (1892).

235.Benson v. United States, 146 U.S. 325 (1892); Fort Leavenworth Railroad v. Lowe, 114 U.S. 525 (1885); Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542 (1885).

236.United States v. Unzeuta, 281 U.S. 138 (1930); Fort Leavenworth Railroad v. Lowe, 114 U.S. 525 (1885); Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542 (1885).

237.Petersen v. United States, 191 F.2d 154 (9th Cir.), cert. denied, 342 U.S. 885 (1951).

238.United States v. Schuster, 220 F. Supp. 61 (E.D. Va. 1963).

239.114 U.S. 525 (1885).

240.Id. at 526. This conclusion had been suggested by earlier decisions. Langford v. Monteith, 102 U.S. 145 (1880); Clay v. State, 4 Kan. 4 (1866).

241.See e.g., chap. 664, Act of July 10, 1890, 26 Stat. 222 (Wyoming); chap. 3335, Act of June 16, 1906, 34 Stat. 267 (Oklahoma); Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339 (Alaska); Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (Hawaii).

242.United States v. Cornell, 25 F. Cas. 646, 649 (C.C.D.R.I. 1819) (No. 14,867). In Commonwealth v. Young, 1 Jour. Juris. 47 (Pa. 1818), it was suggested that concurrent jurisdiction was an impossibility.

243.114 U.S. 525 (1885).

244.Id. at 539.

245.United States v. Unzeuta, 281 U.S. 138 (1930); Crook, Horner & Co. v. Old Point Comfort Hotel Co., 54 F. 604 (C.C.E.D. Va. 1893).

246.302 U.S. 134 (1937).

247.Id. at 148-9.

248.Fort Leavenworth Railroad v. Lowe, 144 U.S. 525 (1885).

249.U.S. Const., art. VI, cl. 2. As a State cannot positively legislate with respect to a Federal function, it cannot supply this authority by a purported reservation of it.

250.State constitutional provisions may affect the matter. A State statute purportedly ceding exclusive jurisdiction was held not to surrender tax authority in view of a State constitutional provision that denied the legislature the power to surrender the State right to tax. I.B.M. Corp. v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957). Contra Hardin County Bd. of Supervisors v. Kentucky Limousines, 293 S.W.2d 239 (Ky. 1956).

251.Steele v. Halligan, 229 F. 1011 (W.D. Wash. 1916); State ex rel. Bd. of Comm'rs v. Bruce, 104 Mont. 500, 69 P.2d 97 (1937), 106 Mont. 322, 77 P.2d 403 (1938), aff'd, 305 U.S. 577 (1938). Contra United States v. Watkins, 22 F.2d 437 (N.D. Calif. 1927); Six Cos., Inc. v. De Vinney, 2 F. Supp. 693 (D. Nev. 1933); Valley County v. Thomas, 109 Mont. 345, 97 P.2d 345 (1939); State v. Mendez, 57 Nev. 192, 61 P.2d 300 (1936); Gill v. State, 141 Tenn. 379, 210 S.W. 637 (1919).

252.371 U.S. 25 (1963).

253.319 F.2d 673 (4th Cir.), cert. denied, 375 U.S. 913 (1963).

254.Id. at 677.

255.Atkinson v. State Tax Comm'n, 303 U.S. 20 (1938); Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937); Fort Leavenworth Railroad v. Lowe, 114 U.S. 525 (1885).

256.Act of Feb. 1, 1940, chap. 18, 54 Stat. 19 (codified at 33 U.S.C. ✍733, 40 U.S.C. ✍255, 50 U.S.C. ✍175). See, e.g., Adams v. United States, 319 U.S. 312, 314-315 (1943) (failure to file acceptance did not pass jurisdiction over military land acquired after enactment of 1940 statute; Federal court therefore lacked jurisdiction over soldiers charged with rape). See also DeKalb County v. Henry C. Beck Co., 382 F.2d 992 (5th Cir. 1967).

257.302 U.S. 186 (1937).

258.Id. at 207-8. Cf. Humble Pipe Line Co. v. Waggoner, 376 U.S. 369 (1964).

259.303 U.S. 20 (1938).

260.215 F.2d 56 (4th Cir. 1954), cert. denied, 348 U.S. 939 (1955).

261.Id. at 58. Compare Markham with United States ex rel. Greer v. Pate, 393 F.2d 44 (7th Cir.), cert. denied, 393 U.S. 890 (1968) (State murder defendant unsuccessfully argued that only a Federal court could exercise jurisdiction over him because he incorrectly thought murder occurred on Federal land acquired in 1931).

262.376 U.S. 369 (1964).

263.Id. at 373-4.

264.378 P.2d 633 (Colo. 1963).

265.Id. at 637. Compare the related problem where the United States purports to retrocede jurisdiction that is not accepted by the State. The "legal no-man's land" situation can arise in other respects. In the notorious Tully case, a murder was committed at Fort Missoula, Montana. The State courts and then the Federal court, in turn, discharged the accused, all finding a lack of legislative jurisdiction over the area. Compare State v. Tully, 31 Mont. 365, 78 P. 760 (1904), with United States v. Tully, 140 F. 899 (C.C.D. Mont. 1905).

266.See Report, supra note 181, at 60.

267.114 U.S. 525 (1885).

268.371 U.S. 245 (1963).

269.319 F.2d 673 (4th Cir.) cert. denied, 375 U.S. 913 (1963).

270.Id. at 679-80.

271.United States v. Unzeuta, 281 U.S. 138 (1930); Yellowstone Park Transp. Co. v. Gallatin County, 31 F.2d 644 (9th Cir.), cert. denied, 280 U.S. 555 (1929).

272.Since Feb. 1, 1940, the United States acquires only such jurisdiction as it expressly accepts. See para. 2-6d, supra.

Where jurisdiction is reserved at the time the State is admitted to the Union, the terms of the statehood act govern the extent of jurisdiction reserved. In the case of Alaska and Hawaii, for instance, only a form of concurrent jurisdiction was reserved with respect to military reservations. See Act of March 18, 1959, ✍ 16(b), Pub. L. No. 86-3, 73 Stat. 4 (Hawaii); Act of July 7, 1958, ✍11(b), Pub. L. No. 85-508, 72 Stat. 339 (Alaska).

273.367 S.W.2d 129 (Ct. App. Ky. 1963).

274.Id. at 133.

275.Paul v. United States, 371 U.S. 245 (1963); Mason Co. v. Tax Comm'n, 302 U.S. 186, 197 (1937).

276.U.S. Const. art. I, ✍ 8, cl. 17. See Phillips v. Payne, 92 U.S. 130 (1876).

277.16 Stat. 399 (1871). See Renner v. Bennett, 21 Ohio St. 431 (1871).

278.114 U.S. 525 (1885).

279.The Secretary of the Army has authority to conduct all affairs of the DA. 10 U.S.C. ✍3012. Note that heads of departments may sometimes accomplish a surrender of jurisdiction by use of general statutory authority to dispose of and lease real property.

280.10 U.S.C. ✍2683.

281.E.g., Act of July 28, 1964, Pub. L. No. 88-384, 78 Stat. 336 (Fort Devens, Massachusetts); Act of Sept. 5, 1962, Pub. L. No. 87-640, 76 Stat. 438 (Fort Hancock, New Jersey); Act of Aug. 25, 1961, Pub. L. No. 87-160, 75 Stat. 398 (Fort Sheridan, Illinois); Act of Aug. 28, 1958, Pub. L. No. 85-813, 72 Stat. 979 (Fort Custer, Michigan). Some statutes retrocede jurisdiction directly, rather than giving authority to the Secretary to do so. E.g., Act of Aug. 30, 1964, Pub. L. No. 88-501, 78 Stat. 619 (outright retrocession to Kansas of exclusive jurisdiction over areas surrounding Fort Leavenworth conditioned on acceptance by Kansas).

282.Act of June 30, 1971, Pub. L. No. 92-36, 85 Stat. 88 (land acquired from Mexico in 1963 after border dispute ceded to Texas together with legislative jurisdiction); Act of Aug. 9, 1969, Pub. L. No. 91-57, 83 Stat. 100 (authorizing the Secretary of the

Interior to convey parts of the Great Smoky Mountains National Park of Tennessee together with legislative jurisdiction to Tennessee).

283.Act of Oct. 23, 1962, ✍1, Pub. L. No. 87-852, 76 Stat. 1129 (codified at 40 U.S.C. ✍319). See AR 405-80, para. 3-14.

284.114 U.S. 525 (1885).

285.Id. at 542.

286.146 U.S. 325 (1892).

287.Id. at 331.

288.278 U.S. 439 (1929). However, Congress can consent to State taxation of the lessee as under the Military Leasing Act of 1947 and the Wherry Military Housing Act of 1949. Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956).

289.281 U.S. 138 (1930).

290.376 U.S. 369 (1964).

291.327 U.S. 558 (1946).

292. Id. at 563-4. See also United States v. Goings, 504 F.2d 809 (8th Cir. 1974) (jurisdiction terminated over land sold to Indian corporation subject to a national security clause that allowed Government reentry in a national emergency).

293.See supra note 179.

294.54 F. 604 (C.C.E.D. Va. 1893).

295.162 U.S. 399 (1896).

296.Id. at 404 (emphasis added).

297.376 U.S. 369 (1964).

298.AR 405-80, paras. 1-4, 3-4 to 3-6.

299.Id. at para. 3-1.

300.Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929).

301.United States v. Unzeuta, 281 U.S. 138 (1930).

302.McDonell & Murphy v. Lunday, 191 Okla. 611, 132 P.2d 322 (1942); Ottinger Bros. v. Clark, 191 Okla. 488, 131 P.2d 94 (1942); Renner v. Bennett, 21 Ohio St. 431 (1871). It is not always beneficial for the State to recover legislative jurisdiction, as it assumes numerous sovereign obligations by so doing. There have been instances where the State has refused to accept the proffer of jurisdiction.

303.114 U.S. 525 (1885).

304.Id. at 540. It is apparent that the Court's decision is not directly on point, as it relates only to cession of jurisdiction by a State to the United States.

305.See supra para. 2-7c(1) and notes 278, 279. See also State v. Lohnes, 69 N.W.2d 508 (Sup. Ct. N.D. 1955). Problems arise with respect to what method of acceptance conforms with the laws of a particular State. Most States have not enacted laws dealing with acceptance of jurisdiction surrendered by the United States.

306.327 U.S. 558 (1946).

307.Id. at 564.

308.113 Cal. 2d 824, 249 P.2d 318 (1952).

309.Id. at 828-9, 249 P.2d at 321-2. A number of authorities refer to Federal legislation of the type described as "receding" jurisdiction to the States. See Report, supra note 181, 190-248. But see the definition of "exclusive legislative jurisdiction" in id. at 10, which is identical to that stated in supra para. 2-5b(1).

310.398 U.S. 419 (1970).

311.Id. at 424-5.

312.See supra para. 2-5a.

313.See Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 260 (1956).

314.AR 405-20, para. 5.

315.Id. at para. 6b(1).

316.Id. at para. 6b(2).

317.Report, supra note 181, 69-79 (Part I, 1956). For a commentary on the need for legislation, see Note, Federal Enclaves--Through the Looking Glass--Darkly, 15 Syracuse L. Rev. 754-62 (1964).

295.Webster's Third New International Dictionary (1971 ed.).

296.Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).

297.Fort Leavenworth Railroad v. Lowe, 114 U.S. 525, 526 (1885).

298.Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944); Murphy v. Love, 249 F.2d 783 (10th Cir. 1957).

299.304 U.S. 518 (1938).

300.Id. at 538.

301.This view also has been applied to stop California from enforcing minimum wholesale milk prices to appropriated fund activities on exclusive jurisdiction installations. Pacific Coast Dairy, Inc. v. Department of Agriculture of Calif., 318 U.S. 285, rehearing denied, 318 U.S. 801 (1943). See Paul v. United States, 371 U.S. 245 (1963). Cf. Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) (Supreme Court upheld a State tax on a milk distributor measured by gallons distributed, where some distributions were to Federal activities located on exclusive jurisdiction areas).

302.412 U.S. 363 (1973), on remand, 378 F. Supp. 558 (S.D. Miss. 1974), rev'd, 421 U.S. 599 (1975).

303.412 U.S. at 376-78.

304.695 F.2d 136 (5th Cir. 1983).

305.DOD policy concerning alcoholic beverages is contained in DOD Dir. 1015.3 (codified at 32 C.F.R. 261.1-6). Army policy concerning alcoholic beverages is contained in AR 215-2, chap. 4.

306.695 F.2d at 141.

307.Id. AR 215-2, para. 4-14a requires that transportation of alcoholic beverages off installations be in accordance with State law.

308.110 S. Ct. 1986 (1990).

309.Id. at 1999.

310.U.S. Const. art. VI, cl. 2. Even in the absence of exclusive jurisdiction, the United States is immune from taxation whose legal incidence falls on the United States. United States v. Mississippi Tax Comm'n, 421 U.S. 599, 613-614 (1975). See also 63 Comp. Gen. 49 (1983) (change in statutory language that made economic but not legal incidence of Vermont gas tax fall on United States permitted taxation of Government). See generally infra para. 2-13. In Paul v. United States, 371 U.S. 245 (1963), Federal procurement policy that requires competitive bidding preempted attempts by California to enforce inflated minimum wholesale milk prices on sales to appropriated fund activities on nonexclusive jurisdiction military installations. AR 215-2, para. 4-12b correctly provides that nonappropriated fund instrumentalities enjoy immunity from State taxation of sales of alcoholic beverages. This is an exercise of supremacy.

311.344 U.S. 624 (1953).

312.4 U.S.C. ✍105-107.

313.344 U.S. at 626-627.

314.State statutes normally do not permit a political subdivision to annex territory not contiguous to its boundaries. See generally Hammock, Annexation of Military Reservations by Political Subdivisions, 11 Mil. L. Rev. 99 (1961).

315.See, e.g., I.B.M. v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957) (State tax on personal property on military reservation upheld as legislature lacked power under constitution to not tax property on land once owned by State).

316.United States v. City of Leavenworth, 443 F. Supp. 274, 281-283 (D. Kan. 1977).

317.See AR 420-90, para. 2-8 (installations should use free local firefighting services where feasible).

318.DOD Dir. 4165.6, Real Property Acquisition, Management and Disposal, para. IVB7 (Dec. 22, 1976); AR 405-25, para. 3.

319.AR 405-25, para. 2b.

320.Id. at para. 3.

321.Id. at para. 2b.

322.Id. at para. 4b.

323.United States v. City of Leavenworth, 443 F. Supp. 274, 280-81 (D. Kan. 1977).

324.443. F. Supp. 274 (D. Kan. 1977).

325.443 F. Supp. at 284-85.

326.No. 82-C-306 (Dist. Ct. Riley County Oct. 29, 1982) (order granting summary judgment). The annexation was invalid because the city failed to comply with Kan. Stat. Ann. ✍12-3001 (1982), which prohibited enactment of an ordinance on the same day as its introduction. Moreover, notice of the proposed annexation was given only to the United States and not to private landowners affected by it as required by Kan. Stat. Ann. ✍12-520a(c) (1982).

327.334 F. Supp. 881 (D. Neb. 1971), aff'd, 474 F.2d 473 (8th Cir.), cert. denied, 414 U.S. 827 (1973).

328.443 F. Supp. at 286-87.

329.714 F.2d 607 (6th Cir. 1983).

330.Ohio Rev. Code Ann. ✍709.01 (1982 Supp.) (providing that military installations may not be annexed without the consent of the Secretary of Defense or a designee).

331.1982 Kan. Sess. Laws chap. 59 at 325. The Kansas statute flatly prohibits annexation of any military installation. Retroactive to Dec. 31, 1981, it negated the local resolution to annex Fort Riley.

332.614 F.2d at 612-613.

333.714 F.2d at 612 n.1.

334.546 F. Supp. 1204 (D. Mass. 1982). Massachusetts granted the United States a 2.18 acre parcel of land in 1941 together with exclusive jurisdiction. The fee interest was subject to a reverter effective when the land was no longer used for naval purposes. All unrecorded reverters were made ineffective by a State statute enacted in 1956. In 1975, the land ceased to be used for naval purposes and the Government sought to dispose of it. The plaintiffs, successors to the State, argued that the land reverted to State ownership in 1975 by operation of the reverter in the original conveyance. The Government argued that by operation of the 1956 statute, the failure to record the reversionary interest extinguished it and ownership remained with the United States. Consequently, the Government argued that plaintiffs were not entitled to the land free but rather would have to purchase it. Applying the doctrine that laws passed by a State after exclusive jurisdiction has passed cannot affect areas of exclusive United States jurisdiction (See Section 2.12), the plaintiffs asserted that the 1956 statute did not apply and therefore the reversionary interest did not have to be recorded. To reach this result, the "state-within-a-state" rationale was relied on by the plaintiffs. The Government successfully argued that the State law could affect the land because it posed no interference with Federal interests, relying on the Howard rationale. The plaintiffs therefore had to purchase the land from the United States. The case illustrates that these two different views of legislative jurisdiction can be used in novel ways to protect State and Federal interests.

335.546 F. Supp. at 1209-1210.

336.Id.

337.Economic Development and Industrial Corp. of Boston v. United States is illustrative of the creative use to which these competing views can be put. See also First Hardin Nat'l Bank v. Fort Knox Nat'l Bank, 361 F.2d 276 (6th Cir.), cert. denied, 385 U.S. 959 (1966) (court, relying on Howard, concluded that under Federal statute permitting a bank to establish a branch bank in the same county as the location of its principal office, the bank on Fort Knox could establish an additional branch off the enclave despite objections of competitor bank); Western Union Telegraph Co. v. Commonwealth of Virginia, 132 S.E. 2d 407 (Va. 1963)

(enclave held to be within State for purposes of statute requiring public telegraph companies to report real and personal property within the State).

338.E.g., Langdon v. Jaramillo, 80 N.M. 255, 454 P.2d 269 (1969); State ex rel. Wendt v. Smith, 63 Ohio Abs. 31, 103 N.E. 2d 822 (1951); Parker v. Corcoran, 144 Kan. 714, 128 P.2d 999 (1942); State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906); In re Town of Highlands, 22 N.Y.S. 137 (Sup. Ct. 1892); Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841). Contra Kashman v. Board of Elections, 54 Misc. 2d 543, 282 N.Y.S.2d 394 (1967) (dictum); Adams v. Londeree, 139 W.Va. 748, 83 S.E.2d 127 (1954); Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (1952).

339.398 U.S. 419 (1970).

340.398 U.S. at 421-422.

341.Id. at 422.

342.18 U.S.C. ✍13.

343.4 U.S.C. ✍104-10.

344.26 U.S.C. ✍3305(d).

345.40 U.S.C. ✍290.

346.398 U.S. at 424-5.

347.139 W.Va 748, 83 S.E.2d 127 (1954).

348.83 S.E.2d at 140-1.

349.Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841).

350.144 Colo. 321, 356 P.2d 267 (1960).

351.356 P.2d at 273-4.

352.DOD Dir. 6400.1, para. D.

353.See generally National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Child Abuse and Neglect Among the Military (1980); U.S. General Accounting Office,

Military Child Advocacy Programs: Victims of Neglect (1979); AR 608-10, para. 1-4a.

354.See AR 608-18; AR 608-10; AR 608-1.

355.AR 608-18, para. 3-9a. See DAJA-AL 1976/5788 (29 Sept. 1976); DAJA-AL 1974/4802 (18 Sept. 1974). All law enforcement and medical personnel are required to report suspected cases of spouse abuse requiring intervention. AR 608-18, para. 3-9b.

356.DAJA-AL 1983/1468 (28 Jan. 1983), digested in The Army Lawyer, Feb. 1984, at 47, records that in the case of local police services extended to exclusive jurisdiction military installations, the Department of Justice informally advised that police officers would not be considered agents of the United States in the event of a lawsuit arising from their activities on the installation and would therefore not be represented by the United States in litigation. See 28 C.F.R. 50.15(a). A court could conclude, applying the traditional view of exclusive jurisdiction, that local officials acting on an exclusive jurisdiction area lack authority to do so and consequently would not be entitled to immunity when sued. See Barr v. Matteo, 360 U.S. 564 (1959); Harlow v. Fitzgerald, 457 U.S. 800 (1982). One remedy for these concerns would be to enter into agreements to indemnify or hold local officials harmless. However, DAJA-AL 1983/1468 (28 Jan. 1983) observes that such agreements offer consideration for local services and are contracts that installation commanders cannot enter into by means of the typical memorandum of understanding used in such circumstances. See also DAJA-AL 1976/4154 (23 Apr. 1976) (Military Traffic Management Command sought authority to conclude indemnification agreement for local police services).

357.101 Cal. App. 3d 178, 161 Cal. Rptr. 452 (Ct. App. 1980).

358.The court cited the previous edition of AR 608-1. The current regulation provides for cooperation with local authorities in similar terms. See AR 608-1, paras. 7-2, 7-3. AR 608-1 points out, for example, that children may be placed in foster care only inter alia when "[t]he civilian child welfare placing agency has authority because of court commitment or emergency (such as abandonment) pending court action." Id. at para. 7-3b.

359.42 U.S.C. ✍620-626.

360.101 Cal. App. 3d at 183, 161 Cal. Rptr. at 455 (quoting 42 U.S.C. ✍622(a)(2)).

361.101 Cal. App. 3d at 183, 161 Cal. Rptr. at 455.

362.Board of Chosen Freeholders v. McCorkle, 98 N.J. Super. 451, 237 A.2d 640 (App. Div. 1968) (local county unsuccessfully sought to avoid paying for child welfare programs for Fort Dix residents--State guardianship, dependent children, and mental commitment laws apply to Fort Dix despite exclusive jurisdiction).

363.State v. Interest of D.B.S., 137 N.J. Super. 371, 349 A.2d 105 (N.J. Super. 1975) (State juvenile delinquency laws permitted State to exercise jurisdiction over Fort Dix youth).

364.Cobb v. Cobb, 406 Mass. 21, 545 N.E.2d 1161 (1989).

365.Traditionally, The Judge Advocate General has taken the position that child welfare laws do not apply on exclusive jurisdiction installations. E.g., DAJA-AL 1974/4802 (18 Sept. 1974) (advising Madigan Army Hospital that Washington courts lack jurisdiction over Fort Lewis child abuse cases). See also DAJA-AL 1972/4706 (15 Aug. 1972); DAJA-AL 1972/4336 (6 July 1972). One option in these cases is to terminate on-post quarters to force the family into the local jurisdiction. See DAJA-AL 1973/4732 (17 Sept. 1973) (discussing this option).

366.Opinion of the Justices, 42 Mass. (1 Met.) 580, 583 (Sup. Jud. Ct. 1841). cf. Newcomb v. Rockport, 183 Mass. 74 (Sup. Jud. Ct. 1903) (discussing effect of legislative jurisdiction over lighthouse and, conceding the lighthouse might be within city limits, concluding that State statute did not require construction of school or provision for transportation to local schools).

367.Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A.2d 621 (1953); Independent School Dist. v. Central Education Agency, 247 S.W.2d 597 (Ct. Civ. App. 1952), aff'd, 152 Tex. 56, 254 S.W.2d 357 (1953); Miller v. Hickory Grove School Bd., 162 Kan. 528, 178 P.2d 214 (1947); McGwinn v. Board of Education, 33 Ohio Op. 433, 649 N.E.2d 391 (1945), aff'd 78 Ohio App. 405, 69 N.E.2d 381, appeal dismissed, 147 Ohio St. 259, 70 N.E.2d 776 (1946); In re Annexation of Reno Quartermaster Depot, 180 Okla. 274, 69 P.2d 659 (1937); Rolland v. School Dist., 132 Neb. 281, 271 N.W. 805 (1937); Rockwell v. Independent School Dist., 48 S.D.

137, 202 N.W. 478 (1925); Hufford v. Herrold, 189 Iowa 853, 179 N.W. 53 (1920).

368.Miller v. Hickory Grove School Bd., 162 Kan. 528, 178 P.2d 214 (1947); Tagge v. Gulzow, 132 Neb. 276, 271 N.W. 803 (1937).

369.Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A.2d 621 (1953); School Dist. #20 v. Steele, 46 S.D. 589, 195 N.W. 448 (1923).

370.E.g., Texas, Nebraska, and possibly others. See Report 219 (Pt. II, 1957). See also Du-Pont-Fort Lewis School District No. 7 v. Clover Park School District, 396 P.2d 979 (Wash. 1969) (Washington law extends right to education to post residents--at issue was which of two school districts was entitled to "attendance credits").

371.Act of Sept. 30, 1950, chap. 1124, 64 Stat. 1101 (codified at 20 U.S.C. ✍✍ 236-244, 631-636). Not all military children are educated in State-run schools. Under ✍ 6 of the same act that authorized impact aid, Federally-run schools also were authorized. These "Section 6" schools are funded by the Department of Defense and run by the Department of Education. See Omnibus Education Reconciliation Act of 1981, ✍ 505(c), Pub. L. No. 97-35, 95 Stat. 442. Section 6 school systems exist at West Point and Forts Benning, Bragg, Campbell, Jackson, Knox, McClellan, Rucker, and Stewart. Procedures for Section 6 school administration and funding are contained in 32 C.F.R. pt. 222 and AR 352-3. See also DAJA-AL 1983/2793 (3 Oct. 1983) (considering impact of 1981 Budget Reconciliation Act on Section 6 program).

372.See, e.g., Omnibus Budget Reconciliation Act, ✍ 505, Pub. L. No. 97-35, 95 Stat. 357 (1981).

373.Va. Code ✍✍ 22.1-3, 5 (1980).

374.N.C. Gen. Stat. ✍ 115C-366.1 (1982).

375.728 F.2d 628 (4th Cir. 1984).

376.Id. at 633-635. See also Lemon v. Bossier Parish School Board, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) (contractual argument used successfully in desegregation case involving education of military children in local schools); United States v. Sumter County School District No. 2, 232 F. Supp. 945 (E.D.S.C. 1964)

(local school board enjoined from denying educational access to military children because of assurances made in connection with receipt of impact aid that they would be educated equally with local children).

377.728 F.2d at 636.

378.See Bank of Phoebus v. Byrum, 110 Va. 708, 67 S.E. 349 (1910).

379.See generally 20 Am. Jur. 2d Courts ✍20121-127 (1965); 21 C.J.S. Courts ✍38-49 (1940).

380.See Pendleton v. Pendleton, 109 Kan. 600, 201 P.62 (1921); Matter of Grant, 83 Misc. 257, 144 N.Y.S. 567 (1913).

381.150 Md. 592, 133 A.729 (1926).

382.Accord Chaney v. Chaney, 53 N.M. 66, 201 P.2d 782 (1949); Dicks v. Dicks, 177 Ga. 379, 170 S.E. 245 (1933). Cf. Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943); Craig v. Craig, 143 Kan. 624, 56 P.2d 464, clarification denied, 144 Kan. 155, 59 P.2d 1101 (1936). The latter three cases involved interpretation of State statutes, enacted in the interim, which extended divorce jurisdiction to residents of Federal areas.

383.150 Md. at 603, 133 A. at 732-3.

384.Shea v. Gehan, 70 Ga. App. 229, 28 S.E.2d 181 (1943); In re Kernan, 247 A.D. 664, 288 N.Y.S. 329 (1936); aff'd, 272 N.Y. 560; 4 N.E.2d 737 (1936); Bliss v. Bliss, 133 Md. 61, 104 A. 467 (1918); Divine v. Unaka Nat'l Bank, 125 Tenn. 98, 140 S.W. 747 (1911).

385.E.g., Fla. Stat. Ann. 47.081 (Harrison 1976) (service members and family members "within the State" are prima facie State residents for purposes of any suit); Tenn. Code Ann. ✍36-803 (1977 repl. vol.) (presumption that service member or spouse is State resident for purpose of divorce actions where resident for at least 1 year); Va. Code. ✍20-97 (1983) (service members and spouses living together for at least 6 months presumed to be State residents for purposes of divorce).

386.10 U.S.C. ✍✍ 4712-13 (Army); 10 U.S.C. ✍ 6522 (Navy); 38 U.S.C. ✍✍ 5220-28 (Veterans Administration); 42 U.S.C. ✍ 248 (Public Health Service).

387.See Martin v. House 39 F. 694 (C.C.E.D. Ark. 1888); Woodfin v. Phoebus, 30 F. 289 (C.C.E.D. Va. 1887); United States v. McIntosh, 57 F.2d 573, 2 F. Supp. 244 (E.D. Va. 1932), appeal dismissed, 70 F.2d 507 (4th Cir.), cert. denied, 293 U.S. 586 (1934); In re Town of Highlands, 22 N.Y.S. 137 (Sup. Ct. 1892); Dibble v. Clapp, 31 How. Pr. 420 (Buffalo Super. Ct. 1866).

388.JAGA 1963/3645 (28 Feb. 1963). In Shea v. Gehan, 70 Ga. App. 229, 28 S.E.2d 181 (1943), it was held that a county court had jurisdiction to commit a person to a veterans' hospital as insane, although the hospital was located on land under exclusive Federal jurisdiction and the person was a patient in the hospital and not a resident of Georgia.

389.JAGA 1962/3507 (26 Feb. 1962). The rationale of this opinion is supported by Corbett v. Nutt, 77 U.S. 464 (1870). Cf. Cobb v. Cobb, 406 Mass. 21, 545 N.E.2d 1161 (1989) (restraining order barring nonmilitary spouse from Government quarters effective since no apparent interference with jurisdiction asserted by Federal Government).

390.28 U.S.C. ✍1332.

391.28 U.S.C. ✍1331.

392.E.g., Jagiella v. Jagiella, 647 F.2d 561, 563 (5th Cir. 1981); Sadat v. Mertes, 615 F.2d 1176, 1180 (7th Cir. 1980); Hawes v. Club Ecuestre El Commandante, 598 F.2d 698, 701-702 (1st Cir. 1979). In Vitro v. Town of Carmel, 433 F. Supp. 1110 (S.D.N.Y. 1977), a soldier stationed at Fort Hamilton tried to sue a town in New York for injuries arising out of an automobile accident. He claimed he was diverse from the town because he was a citizen of Arkansas. Although originally from New York, he moved with his parents to Arkansas and established a new domicile. Enlistment in the Army and being stationed at Fort Hamilton did not change his domicile or citizenship and consequently diversity jurisdiction existed.

393.See generally Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973); Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968); Ostrom v. Ostrom, 231 F.2d 193 (9th Cir. 1955); Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y. 1952). See also P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1189-92 (2d ed. 1973).

394.Looney v. Capital Bank, 235 F.2d 436 (5th Cir.), cert. denied, 523 U.S. 925 (1956); McCan v. First Nat'l Bank of Portland, 139 F. Supp. 224 (D. Ore. 1954). Cf. 18 U.S.C. ✍4244.

395.Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978).

396.United States v. Cornell, 25 F. Cas. 646 (C.C.D.R.I. 1819) (No. 14,867); United States v. Travers, 28 F. Cas. 204 (C.C.D. Mass. 1814) (No. 16,537).

397.Cockburn v. Willman, 301 Mo. 575, 257 S.W. 458 (1923).

398.See Act of Mar. 2, 1795, chap. 40, 1 Stat. 426. See also 23 Op. Att'y Gen. 254 (1900) and People of the State of California v. United States, 235 F.2d 647, 655, 661 (9th Cir. 1956). Even where service or process would otherwise be invalid under this principle, an individual may voluntarily accept service in accordance with the laws of the State issuing the process. See AR 27-40, para. 1-7.

399.AR 27-40, para. 1-7b(3)(b).

400.A reservation by a State of the right to "execute" process retains no more authority in the State than a right to "serve" process. Rogers v. Squier, 157 F.2d 948 (9th Cir. 1946).

401.See generally 72 C.J.S. Process ✍1 (1951).

402.See, e.g., S. Weintraub, City of Philadelphia v. John E. Bullion--The Federal Enclave is Not a Sanctuary, The Army Lawyer, Jan. 1980 n.4 at 15 (Commandant of Fourth Naval District in Philadelphia required his legal office to review documents prior to service).

403.United States v. Cornell, 25 F. Cas. 646, 648-649 (C.C.D.R.I. 1819) (No. 14,867) (reservation of right to serve criminal process "meant to prevent these lands from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the State"); People v. Mouse 203 Cal. 782, 265 P. 944, appeal dismissed, 278 U.S. 614 (1928) (State sodomy conviction reversed where committed at old soldier's home subject to exclusive Federal jurisdiction); People v. Kraus, 212 A. D. 397, 207 N.Y.S. 87 (1924) (State bookmaking conviction committed at Brooklyn Navy Yard which was subject to exclusive U.S. jurisdiction); Lasher v. State, 30 Tex. Cr. App. 387, 17 S.W. 1064 (1891) (soldier's State forgery conviction reversed where offense

committed on an exclusive jurisdiction installation); Commonwealth v. Clary, 8 Mass. 72, 76-77 (1811) (State conviction for unlawful sale of liquor at Springfield Arsenal reversed--purpose of process reservation to prevent territory from becoming a sanctuary). Compare State v. Allard, 313 A.2d 439 (Me. Sup. Jud. Ct. 1973) (lack of exclusive jurisdiction over Federal area permitted arrest). Some State statutes may expressly restrict the reservation to incidents occurring off the enclave. In one statute, for example, Kansas reserved the right to serve process "in suits . . . for or on account of rights acquired, obligations incurred, or crimes committed in said
State, but outside of said cession and reservation." Laws of Kan. of 1875, at 95, cited in People v. Kraus, 212 A. D. 397, 207 N.Y.S. 87, 90 (1924). Almost exactly the same language was used by Congress when, reserving legislative jurisdiction over military lands in Alaska on Statehood, it ceded the right to serve civil and criminal process to the new State. Act of July 7, 1958, ✍ 11(b)(1), Pub. L. No. 85-508, 72 Stat. 339.

404.211 F. Supp. 457 (D. Me. 1962).

405.391 F.2d 523 (9th Cir. 1968). See also Knott Corp. v. Furman, 163 F.2d 199 (4th Cir.), cert. denied, 332 U.S. 809 (1947); Ackerley v. Commercial Credit Co., 111 F. Supp. 92 (D.N.J. 1963); Brennan v. Shipe, 414 Pa. 258, 199 A.2d 467 (1964); City of Philadelphia v. Bullion, 28 Pa. Commw. 485, 368 A.2d 1375, appeal denied for want of substantial Federal question, 434 U.S 914 (1977).

406.391 F.2d at 524. See 29 U.S.C. ✍185(a).

407.391 F.2d at 524-525. See Mont. R. Civ. P. 4B(1).

408.391 F.2d at 525.

409.344 U.S. 624 (1953).

410.See, e.g., Stockwell v. Page Aircraft Maintenance Inc., 212 F. Supp. 102 (M.D. Ala. 1962) (service on Government contractor on enclave does not interfere with Federal function).

411.Op JAGAF 1955/33 (22 July 1955), 5 Dig. Ops. Posts etc., ✍25.9. Cf. JAGA 1951/6857 (21 Nov. 1951), 1 Dig. Ops. Mil. Pers. ✍3.5. Although these opinions are post-International Shoe, they were written before the explosive growth of long-arm statutes.

412.AR 27-40, para. 1-7.

413.10 U.S.C. ✍814.

414.AR 600-40, para. 6.

415.Id.

416.DAJA-AL 1975/3597 (8 Apr. 1975). Although bail bondsmen may be allowed to enter military installations, the commander may not assist in the actual seizure of the individual, although the location of the individual can be disclosed.

417.AR 600-40, para. 6.

418.AR 27-40, para. 10-2.

419.10 U.S.C. ✍982 (Supp. V 1987).

420.DOD Dir. 5525.8, codified at 32 C.F.R. pt. 144.

421.AR 27-40, para. 10-2b.

422.Id. at para. 10-2c, 10-3.

423.Id. at para. 10-5.

424.See Murray v. Joe Gerrick & Company, 291 U.S. 315, 319 (1934).

425.Act of Feb. 1, 1928, chap. 15, 45 Stat. 54 (codified at 16 U.S.C. ✍457).

426.Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959). Although a Federal court may have jurisdiction, venue may be improper. See Reed v. Charizio, 183 F. Supp. 52 (E.D. Va. 1960) (construing Olberding v. Illinois Central R. Co., 346 U.S. 338 (1953)). Cf. Brennan v. Shipe, 414 Pa. 258, 199 A.2d 467 (1964) (State court exercised jurisdiction over accident occurring on enclave, holding that 16 U.S.C. ✍457 allows State law to operate on installation).

427.Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981) (strict liability in tort applied to wrongful death action arising from Air Force crash in Oregon brought against plane's manufacturer--all the State's law applies to wrongful death and personal injury

actions). See also Ashley v. United States, 214 F. Supp. 39 (D. Neb. 1963).

428.Internal Revenue Code of 1954, chap. 736, 68A Stat. 446 (codified at 26 U.S.C. ✍3305(d)). Other provisions of 28 U.S.C. ✍ 3305 require Federal agencies to effect withholding, make contributions, and otherwise comply with State unemployment compensation laws.

429.291 U.S. 315 (1934).

430.Act of June 25, 1936, chap. 822, ✍✍1, 2, 49 Stat. 1938, 1939 (codified at 40 U.S.C. ✍290).

431.Prescott v. United States, 523 F. Supp. 918 (D. Nev. 1981).

432.Roelofs v. United States, 501 F.2d 87, 92-95 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975).

433.Id.; Peak v. Small Business Administration, 660 F.2d 375, 378 (8th Cir. 1981); Griffin v. United States, 644 F.2d 846, 847-48 (10th Cir. 1981).

434.Act of Feb. 23, 1799, chap. 12, ✍1, 1 Stat. 619 (codified as amended at 42 U.S.C. ✍97).

435.Act of Feb. 28, 1958, Pub. L. No. 85-337, 72 Stat. 29 (codified at 10 U.S.C. ✍2671(a)).

436.Act of Sept. 15, 1960, Pub. L. No. 86-797, 74 Stat. 1052 (codified at 16 U.S.C. ✍670a).

437.1958 U.S. Code Cong. & Admin. News 2230-2231.

438.10 U.S.C. ✍2671(c).

439.10 U.S.C. ✍2671(a)(3).

440.AR 420-74, para. 5-3a. AR 420-74 implements DOD Dir. 4170.6 (codified at 32 C.F.R. 232.1-7).

441.Act of Oct. 9, 1940, chap. 787, 54 Stat. 1059 (codified as amended at 4 U.S.C. ✍105). This section does not authorize State taxation of sales by Federal instrumentalities, 4 U.S.C. ✍107. United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973).

442.Act of Oct. 9, 1940, chap. 787, 54 Stat. 1059 (codified as amended at 4 U.S.C. ✍106). This section does not authorize State taxation of the income of Federal instrumentalities. 4 U.S.C. ✍ 107. The United States has consented to State taxation of the income of Federal employees. 4 U.S.C. ✍ 111. It has also provided for the collection of State withholding from compensation paid Federal civilian personnel. 5 U.S.C. ✍5517a.

443.Act of June 16, 1936, chap. 582, ✍10, 49 Stat. 1521 (codified as amended at 4 U.S.C. ✍104). See State Motor Fuel Tax Liability of A.G.E. Corp., 273 N.W.2d 737 (S.D. Sup. Ct. 1978) (discussing exclusive use by United States). This statute does not permit taxation of gas used by the Government. However, where the legal incidence of a State taxing scheme falls on a vendor, the United States may be liable to pay the passed-on cost of taxes when it purchases gas for its own use. See, e.g., 63 Comp. Gen. 49 (1983).

444.10 U.S.C. ✍ 2667(e). In Offutt Housing Co. v. County of Sarpy, 351 U.S. 253 (1956), the Supreme Court held that under this statute, the State could tax a lease entered into for the purpose of erecting Wherry Housing. This resulted in remedial legislation in 1955 that exempted certain defense housing from local taxation. Act of Aug. 7, 1956, chap. 1029, ✍511, 70 Stat. 1111. In Puerto Rico v. Esso Standard Oil Co., 332 F.2d 624 (1st Cir. 1964), the court held that this statute permits State taxation of a lessee's private property located on leased land under exclusive Federal jurisdiction.

445.539 F.2d 301 (3d Cir. 1976).

446.4 U.S.C. ✍110(c).

447.539 F.2d at 310.

448.573 F. Supp. 686 (D. Colo. 1983).

449.573 F. Supp. at 688, citing United States v. Lewisburg Area School Dist., 539 F.2d 301, 306 (3d Cir. 1976).

450.S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940), cited in 573 F. Supp. at 691.

451.S. Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940), cited in 573 F. Supp. n.10 at 691 (emphasis supplied).

452.In so holding the court relied in part on Howard v. Commissioners of Louisville, 334 U.S. 624, 629 (1953), in which Justice Douglas, dissenting, stated: "[t]he Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States." 573 F. Supp. at 691 n.12.

453.See cases collected in 573 F. Supp. at 692 n.13.

454.16 U.S.C. ✍465.

455.16 U.S.C. ✍480.

456.16 U.S.C. ✍715.

457.40 U.S.C. ✍421.

458.42 U.S.C. ✍1547.

459.42 U.S.C. ✍1592f.

460.43 U.S.C. ✍1333.

461.16 U.S.C. ✍821.

462.43 U.S.C. ✍383.

463.114 U.S. 542 (1885).

464.Id. at 546.

465.278 U.S. 439 (1929).

466.Kniffen v. Hercules Powder Co., 164 Kan. 196, 188 P.2d 980 (1948); Norfolk & P.B.L.R. v. Parker, 152 Va. 484, 147 S.E. 461 (1929); Henry Bickel Co. v. Wright's Adm'x, 180 Ky. 181, 202 S.W. 672 (1918); Kaufman v. Hopper, 220 N.Y. 184, 115 N.E. 470 (1917). But the McGlinn principle does not adopt the criminal law of a State. In re Ladd, 74 F. 31 (C.C.D. Neb. 1896).

467.Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959); Mater v. Holley, 200 F.2d 123 (4th Cir. 1952); Olsen v. McPartlin, 105 F. Supp. 561 (D. Minn. 1952).

468.371 U.S. 245 (1963).

469.E.g., Board of Supervisors of Fairfax County v. United States, 408 F. Supp. 556 (E.D. Va. 1976).

470.Thiele v. City of Chicago, 12 Ill. 2d 218, 145 N.E.2d 637 (1957).

471.Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) (dictum).

472.Webb v. J. G. White Eng'g Corp., 204 Ala. 429, 85 So. 729 (1920) (State law superseded by Federal law providing compensation for injured Federal employees). Cf. Hill v. Ring Constr. Co., 19 F. Supp. 434 (W.D. Mo. 1937) (State law definition of "cubic yard" not enforceable in contract interpretation because inconsistent with "national common law" definition); Anderson v. Chicago and Northwestern R.R., 102 Neb. 578, 168 N.W. 196 (1918) (State statute requiring fencing of railroad rights-of-way not enforceable due to War Department directive to railroad to disregard State law).

473.371 U.S. 245 (1963).

474.Id. at 247.

475.The underlying statute provides that it is applicable "to the purchase [by certain agencies] of all property . . . for which payment is to be made from appropriated funds." 10 U.S.C. ✍2303.

476.371 U.S. at 252.

477.The distinction made by the Court between appropriated and nonappropriated funds would be unimportant today since the nonappropriated fund contracting policy, similar to the statutory and regulatory procurement policy for appropriated funds, requires that purchases be made competitively. AR 215-4, para. 1-11. The effect of this regulatory framework would be to displace any State law, like that in Paul, which might otherwise survive via McGlinn.

478.371 U.S. at 252.

479.646 F.2d 1057 (5th Cir. 1981), cert. denied, 458 U.S. 1106 (1982).

480.But see Vincent v. General Dynamics, 427 F. Supp. 786 (N.D. Tex. 1977) (holding that Federal policy at least equal to Texas

right-to-work laws but falling short of holding that the Federal policy displaced or preempted State policy).

481.Id. Exclusive jurisdiction was exercised over two parcels and no jurisdiction over a third. State right-to-work laws were adopted after the transfer of jurisdiction over one parcel but before the transfer of the other. Because the greater number of workers and the greater land area were not subject to State law, the Federal policy in favor of union security clauses controlled over all areas.

482.U.S. Const. art. VI, cl. 2.

483.17 U.S. (4 Wheat.) 316 (1819).

484.17 U.S. (4 Wheat.) at 403.

485.114 U.S. 525 (1885).

486.Id. at 527, 539.

487.Wisconsin Central R.R. v. Price County, 133 U.S. 496, 504 (1890); Van Brocklin v. Tennessee, 117 U.S. 151, 176 (1886). See United States v. Woodworth, 170 F.2d 1019 (2d Cir. 1948), holding that the exemption applies to taxes levied before Federal acquisition if not perfected into a lien by that time. To the same effect is Comp. Gen. Dec. B-91662, 26 Jan. 1950. Cf. United States v. Alabama, 313 U.S. 274 (1941).

488.Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933); Lee v. Osceloa & Little River Road Improvement Dist., 268 U.S. 643 (1925); Wisconsin Central R. Co. v. Price, 133 U.S. 496 (1890); Comp. Gen. Dec. B-24813, 26 Jan. 1944. See 29 Comp. Gen. 18 (1949); 27 Comp. Gen. 20 (1947).

489.Ms. Comp. Gen. B-122372, 15 Mar. 1955; Ms. Comp. Gen. B-47822, 25 Sept. 1946.

490.31 Comp. Gen. 405 (1952); 20 Comp. Gen. 206 (1940); 15 Comp. Gen. 380 (1935).

491.Utah Power and Light Co. v. United States, 243 U.S. 389 (1917). A proceeding to condemn land, in which the United States has an interest, is a suit against the United States that may be brought only by the consent of Congress. Minnesota v. United States, 305 U.S. 382, 386-87 (1939).

492.Ohio v. Thomas, 173 U.S. 276 (1899).

493.Hunt v. United States, 278 U.S. 96 (1928).

494.United States v. City of Chester, 144 F.2d 415 (3d Cir. 1944); United States v. Philadelphia, 56 F. Supp. 862 (E.D. Pa. 1944), aff'd, 147 F.2d 291 (3d Cir.), cert. denied, 325 U.S. 870 (1945); Curtis v. Toledo Metropolitan Housing Authority, 36 Ohio Ops. 423, 78 N.E.2d 676 (Ohio Ct. App. 1947); Tim v. City of Long Branch, 135 N.J.L. 549, 53 A.2d 164 (1947).

495.Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956).

496.United States v. Allegheny County, 322 U.S. 174, 183 (1944); United States v. Snyder 149 U.S. 210 (1893); In the Matter of American Boiler Works, Inc., Bankrupt, 220 F.2d 319 (3d Cir. 1955); Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955); In re Read-York, Inc., 152 F.2d 313 (7th Cir. 1945).

497.Ruddy v. Rossi, 248 U.S. 104 (1918). See also Wissner v. Wissner, 338 U.S. 655 (1950); United States v. San Francisco, 310 U.S. 16 (1940).

498.E.g., Act of July 14, 1954, chap. 482, 68 Stat. 474; Act of June 1, 1955, chap. 112, 69 Stat. 70.

499.United States v. Murray, 61 F. Supp. 415 (E.D. Mo. 1945).

500.319 U.S. 441 (1943).

501.319 U.S. at 447.

502.DAJA-AL 1983/1782 (7 May 1983), digested in The Army Lawyer, Dec. 21, 1983, at 21.

503.DAJA-AL 1982/3084 (7 Dec. 1982), digested in The Army Lawyer, Nov. 1983, at 29-30.

504.254 U.S. 51 (1920).

505.Id. at 56-7. Note that the Government vehicles themselves are immune from State regulation. A State cannot require the installation of safety devices, such as mud flaps and signaling devices, on Army vehicles. As the Court observed, State laws are unenforceable against Federal officers who commit a homicide or

assault while pursuing their duties. In People of the State of New York v. Miller, No. 77 CR 26 (E.D.N.Y. July 20, 1977) (order of dismissal), for example, a removed State prosecution arising from a vehicular homicide was dismissed. While driving in a convoy, a soldier struck a civilian vehicle, killing a passenger. The soldier had neither a State nor military driver's license and was prosecuted for driving without a license. Because the driver was acting under the orders of his commander, supremacy insulated the driver from State prosecution. The fact that Miller lacked a military driver's license was solely a matter of Federal concern. See also Castle v. Lewis, 254 F. 917 (8th Cir. 1918); United States v. Lewis, 129 F. 823 (C.C.W.D. Pa. 1904), aff'd 200 U.S. 1 (1906); In re Laing, 127 F. 213 (C.C.S.D. W.Va. 1903); In re Fair, 100 F. 149 (C.C.D. Neb. 1900); United States ex rel. McSweeney v. Fullhart, 47 F. 802 (C.C.W.D. Pa. 1891); North Carolina v. Kirkpatrick, 42 F. 689 (C.C.W.D.N.C. 1890); Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944); Ex parte Warner, 21 F.2d 542 (N.D. Okla. 1927); Ex parte Dickson, 14 F.2d 609 (N.D.N.Y. 1927); United States v. Lipsett, 156 F. 65 (W.D. Mich. 1907); Kelly v. Georgia, 68 F. 652 (S.D. Ga. 1895); In re McShane's Petition, 235 F. Supp. 262 (N.D. Miss. 1964). Some cases hold that State courts lack jurisdiction. E.g., Brown v. Cain, 56 F. Supp. 56 (E.D. Pa. 1944); In re Lewis, 83 F. 159, 160 (D. Wash. 1897). Others hold that Federal duty is simply a defense to be raised. E.g., United States ex rel. Drury v. Lewis, 129 F. 823 (C.C.W.D. Pa. 1904), aff'd, 200 U.S. 1 (1906); In re Neagle, 135 U.S. 1, 75 (1890). Federal officers and military personnel, respectively, can remove State prosecutions brought against them to Federal court under 28 U.S.C. ✍1442(a)(1) and 1442a. Once they remove they can raise whatever defenses they may have. Even where supremacy may not operate directly, defendant can raise official immunity as a defense and have it judged under Federal law. See Willingham v. Morgan, 395 U.S. 402 (1969). In criminal cases, a causal connection between the case and Federal duties must be shown to remove. Id. at 409 n.4. See Commonwealth of Virginia v. Harvey, 571 F. Supp. 464 (E.D. Va. 1983) removal by Marine charged with manslaughter denied even though he was a duty driver at time of accident); Colorado v. Maxwell, 125 F. Supp. 18 (D. Colo. 1954) (removal of case against State sheriff who shot escaping soldier who he detained at military request). Upon removal, the State's substantive law applies and the case is prosecuted by State authorities. See Arizona v. Manypenny, 451 U.S. 232 (1981) (border patrolman charged with maiming illegal immigrant removed case and, despite jury verdict of guilt, was acquitted by court based on official immunity). For

standards of official immunity, see Barr v. Matteo, 360 U.S. 564 (1959); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

506.AR 190-5, para. 5-2 (codified at 32 C.F.R. 634.5(b)).

507.Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653 (1918) (mail carrier liable for violation of traffic regulations); United States v. Hart, 26 F. Cas. 193 (C.C.D. Pa. 1817) (No. 15,316) (law requiring mail to go through did not insulate mail carrier from liability for mail driver who endangered persons by how he drove a carriage); accord Hall v. Commonwealth, 129 Va. 738, 105 S.E. 551 (1921); Oklahoma v. Willingham, 143 F. Supp. 445 (E.D. Okla. 1956).

508.29 F.2d 61 (4th Cir. 1928).

509.Id. at 64.

510.Letter from Att'y Gen. to DA, Apr. 3, 1962, as digested in 99 Judge Advocate Legal Service 7.

511.Id.

512.46 Comp. Gen. 624, 627-28 (1967). See also 52 Comp. Gen. 83 (1972).

513.458 U.S. 141 (1982).

514.458 U.S. at 152-154. Construing Fidelity Federal Savings and Loan, Conference of State Bank Supervisors v. Conover, 710 F.2d 878 (D.C. Cir. 1983), rejected application of a presumption against Federal administrative preemption of State law and a standard of review requiring that preempting regulations withstand strict scrutiny in which there would have to be persuasive evidence of congressional intent contemplating preemption of State law.

515.10 U.S.C. ✍3012g. Some Federal regulations may refer to State law, but the decision to do so rests in the discretion of Federal authorities. See, e.g., DAJA-AL 1984/2209 (19 July 1984) (advising that while General Counsel, Office of Personnel Management, can require civilian employees to adhere to State requirements concerning delivery of emergency medical services, State restrictions cannot apply to service members who provide such services on or off post).

516.See Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484 (1942) (holding that departmental regulations have the force of law).

517.But see JAGA 1964/4031 (12 June 1964). The opinion advises that local post traffic regulations will not displace State law federalized under the Assimilative Crimes Act, 18 U.S.C. ✍13, although Army regulations can. The opinion does not follow from Standard Oil Co. of California v. Johnson, 361 U.S. 481 (1942), however, which the opinion cites as the basis for its conclusion.

518.AR 600-20, para. 2-3.

519.UCMJ, art. 92.

520. See 5 U.S.C. ✍7501-7514.

521.367 U.S. 886 (1961).

522.Id. at 893.

523.424 U.S. 828 (1976).

524.424 U.S. at 840. See also Relford v. Commandant, 401 U.S. 355, 367 (1971); Brown v. Glines, 444 U.S. 348, 353, 360 (1980). In United States v. Adams, No. C80-2049A (N.D. Ga. Jan. 8, 1981) (order granting preliminary injunction), an exercise of inherent authority was held to be excessive. In accordance with the Act of Aug. 8, 1949, chap. 40, 63 Stat. 570 (codified at 12 U.S.C. ✍1748-1748h-3) (colloquially referred to as the Wherry Housing Act), land at Fort Gillem, Georgia, was leased to construct private apartments that would be available for rental by military personnel. The Government agreed to a long-term lease at a nominal rental in exchange for construction of housing to Government specifications and rent control. See generally United States v. Benning Housing Corp., 276 F.2d 248 (5th Cir. 1960). Several years later, the Secretary of the Army decided to terminate the lease because of deteriorating conditions in the housing area. Slip. op. at 3. Based on "his independent role as base commander with responsibility for the health and safety those living under his command, the post commander decided to close the complex to new tenants and to require existing tenants to vacate." Id. The United States subsequently sued to terminate the lease or, in the alternative, to force the lessee to maintain and repair the premises. The lessee successfully sought a preliminary injunction

to block the closure of the project pending the litigation. Although "[t]he court [did] not quarrel with the Government's assertion that the base commander has the authority, even the duty, to protect the health and safety of military personnel and civilians under his command. . . [or] that this authority is derived from sound constitutional, statutory and regulatory bases," (slip op. at 6), the court concluded that: "[The Commander] acted arbitrarily and capriciously by ordering Holland Park to be closed when no health and safety regulations had been promulgated, the standards used were not otherwise articulated, and the action taken, closing the complex [was], totally out of proportion to the safety hazard presented."

525. AR 210-10, para. 2-23.

526.3 Op. Att'y Gen. 268, 269 (1837) (civilian workers at military base regarded as "tenants at will" and liable to removal at discretion of commanding officer); accord JAGA 1925/680.44 (6 Oct. 1925); JAGA 1956/8970 (27 Dec. 1956); JAGA 1964/4478 (21 Aug. 1964). Overseas commanders routinely exercise authority to bar individuals from their installations. This authority arises in part from proprietorial right. AEAJA-AL 1982/1004 (26 Oct. 1982). Principally, the right of sending States under status of forces agreements (SOFA) to provide for installation security implicitly carries with it the right to bar unwanted individuals. See NATO SOFA, art. VII, ✍10(a); Korea SOFA, art. III, ✍1.

527.367 U.S. 886 (1961).

528.United States v. Mowat, 582 F.2d 1194, 1203 (9th Cir.), cert. denied, 439 U.S. 967 (1978). But see Holdridge v. United States, 282 F.2d 302, 309-310 (8th Cir. 1960) (in dicta, observes that the first part of section 1382 requires proof of "purpose and prohibition"); Compare Mowat with United States v. Patz, 584 F.2d 927 (9th Cir. 1978) (discussing State trespass violation as predicate for violation of section 1382).

529.5 U.S.C. ✍ 552(a)(1)(D). See also 44 U.S.C. ✍1505; DOD Dir. 5400.9, (codified at 32 C.F.R. pt. 296); AR 310-4.

530.5 U.S.C. ✍552(a)(1).

531.DAJA-AL 1978/2898 (30 June 1978), digested in The Army Lawyer, Dec. 1978, at 18 advised that entry regulation for installations in Hawaii had to be published, noting that 5 U.S.C. ✍551(4)

defines a rule as a "Statement of general or particular applicability and future effect designed to implement or prescribe law or policy." In 1980, the Adjutant General, asked to consider The Judge Advocate General's opinion, decided not to publish local Fort Stewart regulations on the ground that although 5 U.S.C. ✍551(4) defines a rule as a statement of general or particular applicability, 5 U.S.C. ✍552(a)(1)(D) requires only that statements of general applicability be published. Indorsement from HQDA (DAAG-AMR-R) to Commander, 24th Infantry Division and Fort Stewart (25 Sept. 1980). The Adjutant General's opinion failed to consider the Administrative Conference's authoritative interpretation in 1 C.F.R. 1.1 that a document of general applicability means: "any document issued under proper authority prescribing a penalty or course of conduct . . . or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality. . . ."

532.United States v. Parrilla-Bonilla, 648 F.2d 1371 (1st Cir. 1981); United States v. Mowat, 582 F.2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978).

533.In United States v. Floyd, 447 F.2d 217 (10th Cir.), cert. denied, 414 U.S. 1044 (1973), antiwar protestors at Tinker Air Force Base were successfully prosecuted based on the actual notice provided them by a white line across the base entrance and a statement read to them that said that their entry would be unlawful. See also United States v. Hall, 742 F.2d 1153 (9th Cir. 1984). In United States v. Mowat, 582 F.2d 1194 (9th Cir.), cert. denied, 439 U.S. 967 (1978), sufficient notice was afforded to protestors as a result of extensive publicity and prior arrests of members of the group. The opposite result on similar facts obtained in United States v. Parrilla-Bonilla, 648 F.2d 1371 (1st Cir. 1981).

534. See United States v. Albertini, 472 U.S. 675 (1985) (attending installation open house nine years after receiving bar letter is sufficient ground for prosecution). See also United States v. Vasarajs, 908 F.2d 443 (9th Cir. 1990).

535.The reason for a person's decision to reenter a military installation in violation of a bar letter is irrelevant to the prosecution. Holdridge v. United States, 282 F.2d 302, 309-311 (8th Cir. 1960); United States v. Bowers, 590 F. Supp. 307, 310 (N.D.N.Y. 1983). See also Weissman v. United States, 387 F.2d 271 (10th Cir. 1967). With respect to the validity of the original bar, a criminal prosecution for reentry is not the time to

challenge the bar. A person who is barred is free to challenge the bar in a separate proceeding in Federal court. "[To] find exhaustion of such remedies is not required, substantially dilutes the effectiveness of the criminal sanction that Congress deliberately placed behind a post commander's order of debarment. . . . By requiring [one] to proceed in an orderly manner to first litigate any alleged constitutional infirmity in the debarment order, the Court could assure him a forum for the assertion of such claims while preserving to the post commander the availability of relatively summary criminal sanction against one who violated a debarment order whose validity has not been contested." Flower v. United States, 407 U.S. 197, 201 (1972) (Rehnquist, J., dissenting). Some courts have not permitted impeachment of the original order. Thus, United States v. Jelinski, 411 F.2d 476, 477 n.2 (5th Cir.), cert. denied, 396 U.S. 943 (1969), held: The underlying
bases of the order are not in issue in the criminal proceeding. The criminal responsibility under ✍ 1382 is premised on a violation of the mandate of the order, not its substantive basis. Other courts have permitted the defendant to enquire in the ensuing prosecution for reentry whether the original bar was arbitrary or capricious, "at least where the [service] has promulgated regulations using that standard for the removal of persons from the base." United States v. Bowers, 590 F. Supp. 307, 310 (N.D.N.Y. 1983). See also Bridges v. Davis, 443 F.2d 970 (9th Cir.), cert. denied, 405 U.S. 919 (1971); United States v. Gourley, 502 F.2d 785 (10th Cir. 1973).

536. The Government must show absolute ownership or exclusive possession of the property trespassed upon. In one case, the Government sustained this burden by testimony that the area from which the defendant had been excluded was within the perimeter of the reservation, although outside the perimeter fence. United States v. Packard 236 F. Supp. 585 (N.D. Cal.), aff'd mem., 339 F.2d 887 (9th Cir. 1964). See United States v. Lavalley, 957 F.2d 1309 (6th Cir. 1992). But see United States v. Watson, 80 F. Supp. 649 (E.D. Va. 1948). In United States v. Allen, 924 F.2d (2nd Cir. 1991) the court held that a national security zone declared around a Trident Nuclear Missile Submarine docked in a public river constituted sufficient ownership to support prosecution under 18 U.S.C. ✍1382.

537.The order not to reenter is colloquially referred to as a "bar" or "bar letter." Letters of "ejectment" are occasionally found although there is no distinction between the two terms. "Ejectment" was a term used in older regulations, which have been

superseded (although it still appears in AR 600-40, para. 3c). DAJA-AL 1972/4709, 1 Sept. 1972, suggests that the statute places a nondelegable duty on the installation commander to personally issue bars. Cf. DAJA-AL 1984/2407, 13 July 1984 (advising that while a subordinate can sign the letter, the decision to bar must be made by the commander); United States v. Ramirez Seijo, 281 F. Supp. 708 (D.P.R. 1968) (section 1382 conviction overturned because the bar letter was authored by the area Army Engineer and not by the local commander). But see Serrano-Medina v. United States, 709 F.2d 104, 105 n.1 (1st Cir. 1983) (conviction upheld where base executive officer, to whom power was delegated, issued bar). The decision to bar should be made by the commander based on the individual facts of each case. Thus, a blanket bar issued to all soldiers discharged through the former "trainee discharge (then an undesirable discharge) program" was considered to be of doubtful validity in DAJA-AL 1976/6147 (29 Dec. 1976), digested in The Army Lawyer, July 1977, at 25, although a bar of all soldiers receiving a punitive discharge or an other-than-honorable discharge was
found to be unobjectionable in DAJA-AL 1956/8970 (27 Dec. 1956).

538.See, e.g., United States v. May, 622 F.2d 1000 (9th Cir.), cert. denied, 449 U.S. 984 (1980); United States v. Lowe, 654 F.2d 562 (9th Cir. 1981).

539.Serrano-Medina v. United States, 709 F.2d 104 (1st Cir. 1983) (NAFI employee who also drove a taxi on base not entitled to due process); Tokar v. Hearne, 699 F.2d 753 (5th Cir. 1983) ("slight economic advantage gained through" use of military facilities not a property interest whose denial is conditioned on procedural due process); United States v. Jelinski, 411 F.2d 476 (5th Cir.), cert. denied, 396 U.S. 943 (1969) (conviction of dependent of overseas serviceman for unlawful reentry upheld despite absence of notice and hearing); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (employee of restaurant located on Navy base excluded summarily for security reasons without a hearing); but see Kiiskila v. Nichols, 433 F.2d 745, 747 n.1 (7th Cir. 1970) (en banc) (dictum that absent explicit authorization, military commander may not exclude civilian employees from a military installation without a hearing).

540. Some regulations provide due process before entitlements can be withdrawn. See, e.g., AR 600-8-14, para. 14-3(d); AR 60-20, para. 2-15(d) (right to respond before post exchange privileges can be revoked); AR 190-5, para. 2-2d (right to respond before driving privileges can be revoked); and AR 210-7, para. 4-5

(hearing before a solicitor's permit can be revoked). For an excellent treatment of due process concerns for military lawyers, see Rosen, Thinking About Due Process, The Army Lawyer, Mar. 1988, at 3. Due process of law and its relationship to access to post services is discussed in Wilkerson, Administrative Due Process Requirements in the Revocation of On-Post Privileges, 73 Mil. L. Rev. 107 (1976), and O'Roark, Military Administrative Due Process of Law as Taught by the Maxfield Litigation, 72 Mil. L. Rev. 137 (1976). See also chap. 4, ✍1, infra. An issue raised by these regulations is whether the due process they require must be afforded an individual being absolutely barred from an installation. One argument may be that these regulations are subordinate or subject to action taken under 18 U.S.C. ✍1382 and that due process is unnecessary. This seems consistent with Tokar v. Hearne and United States v. Jelinski, cited in note 552 above, although neither case considered service regulations that make termination of post privileges contingent on due process. The contrary argument is
that these regulations are self-imposed restraints on the commander's action that must be observed before imposing an absolute bar. Providing the minimal due process these regulations require prior to or after the bar will pretermit an otherwise litigable issue. One additional problem is generated by AR 600-8-14, para. 14-4(g), which provides that misconduct in one resale facility is not necissarily a sufficient ground to terminate privileges in another facility. If this is a restraint on the commander's action under 18 U.S.C. ✍1382, an absolute bar will never be imposable on someone subject to the regulation's protections. Similar issues arise with respect to civilian employees who are protected by regulations and statutes, which describe the grounds for and means of removal from employment. Although Serrano-Medina v. United States, 709 F.2d 104 (1st Cir. 1983), suggests in part that a nonappropriated fund employee can be barred without due process without regard to the effect on employment, the case did not consider the impact of service regulations, like AR 215-3, chap. 7, that may create a greater interest in nonappropriated fund employment and require due process before termination. The extensive statutory protections for civil servants create greater problems. See 5 U.S.C. ✍7511-7514. It may be that they do not diminish the commander's power to bar but nevertheless leave an employee entitled to the benefits and compensation of employment until statutory removal procedures are followed. One anomalous result that may follow from civil service law is that misconduct sufficient to bar may be insufficient to terminate employment. Because termination must promote the efficiency of the civil service, 5 U.S.C. ✍7513, a

nexus between misconduct and employment must be shown. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). See D.E. v. Department of the Navy, 721 F.2d 1164 (9th Cir. 1983) (sexual abuse of daughter was insufficient to require removal); Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977) (off-duty use of marijuana did not promote efficiency of service); Merritt v. Department of Justice, 81 FMSR 7046 (1981) (off-duty use of marijuana did not require removal). But see Abrams v. Department of the Navy, 714 F.2d 1219 (3d Cir. 1983) (nexus shown where employee shot another in card game); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982), cert. denied, 103 S. Ct. 752 (1983) (nexus shown where employee convicted of sexual abuse of child). Consequently, misconduct during a lunch hour on one part of an installation may be insufficient to terminate employment on another location of the installation because removal for misconduct that does not occur in or near the work place does not promote the efficiency of the service. Hence, misconduct may be insufficient to remove the employee although it might otherwise
suffice to bar the employee from the installation.

541.50 U.S.C. ✍797.

542. The statute requires that a military commander must be "designated by the Secretary of Defense" to promulgate these regulations. DOD Dir. 5200.8, para. D1 designates "commanding officers of all military reservations, posts, camps, stations, or installations subject to the jurisdiction, administration, or in the custody of the Department of the Army" to exercise this authority.

543.See 1950 U.S. Code Cong. Serv. 3886-3906.

544.After listing several areas in which regulation would be appropriate, the statute continues: "or otherwise providing for safeguarding the same against destruction, loss, or injury by accident or by enemy action, sabotage or other subversive actions, shall be guilty of a misdemeanor . . ." (emphasis added). If this language modifies the previous language, then only regulations meant to avoid accidents or to make the installation secure will be enforceable. On the other hand, if this language is independent, then any regulation relating to "unsatisfactory conditions," ingress, egress, or removal of persons will be enforceable.

545.See United States v. Aarons, 310 F.2d 341 (2d Cir. 1962); In re Pacific Far East Line, Inc., 314 F. Supp. 1339 (N.D. Cal. 1970), aff'd, 472 F.2d 1382 (9th Cir. 1973).

546.DOD Dir. 5200.8, para. C.

547. See also AR 50-6, paras. 5-1 through 5-4.

548. See United States v. Allen, 924 F.2d 29 (2nd Cir. 1991). Federal control of off-post aircraft accident sites is discussed in DAJA-AL 1982/3084, 7 Dec. 1982, digested in The Army Lawyer, Nov. 1983, at 29-30.

551.DOD Dir. 1325.6, AR 210-10, AR 600-20.

552.AR 600-20, para. 5-3. The regulation vests discretion in commanders to permit such activity, although this discretion is limited by DOD Dir. 1325.6, para. IIIE, directing commanders to prohibit activities that could interfere with or prevent the orderly accomplishment of mission or that presents a clear danger to loyalty, discipline, or morale. In Locks v. Laird, 441 F.2d 479 (9th Cir. 1971), cert. denied, 404 U.S. 986 (1972), an airman pending court-martial charges was denied injunctive relief against an Air Force regulation prohibiting the wearing of the uniform at a public demonstration. In Culver v. Secretary of Air Force, 559 F.2d 622 (D.C. Cir. 1977), the Air Force prohibition on demonstrations and political activities by United States Air Force members in foreign countries was held constitutional. See generally DA Pam 190-2. Members of the Armed Forces also are prohibited from organizing, joining, or participating in military unions. 10 U.S.C. ✍975. See also DOD Dir. 1354.1; AR 600-80.

553.367 U.S. 886 (1961).

554.Id. at 893.

555.407 U.S. 197 (1972).

556.The Court granted certiorari and reversed in the same decision without benefit of briefs or argument.

557.The United States had granted an easement of "unobstructed civilian passage" on New Braunfels Avenue to San Antonio.

558.407 U.S. at 198. Where special interests are abandoned and a public forum is created, an installation can subsequently be closed to further first amendment expression. In Quilty v. Burbules, No. 84-4058 (C.D. Ill. Aug. 3, 1984) (order denying preliminary injunction), plaintiffs, who had been allowed for several years to conduct "prayer services" near a "peace tree" planted on Rock Island Arsenal, were denied permission to conduct similar services in 1984. The court concluded that the plaintiffs did not have a likelihood of success in demonstrating a first amendment right because installation of fences and "conditions of entry" and restricted area signs was sufficient to reassert control in the installation by military authorities. See also United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984) (related case, discussing inter alia the applicability of a defense to a trespass prosecution that moral necessity to oppose nuclear weapons excuses trespass).

559.United States v. Gourley, 502 F.2d 785 (10th Cir. 1974) (actions taken by Commandant of the Air Force Academy to "close" the post were pro forma where football games and the Academy chapel were open to the public and air police only selectively stopped persons who sought entry); Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973) (leafleting permissible on public highway and adjacent areas at Fort Bragg); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973) (commander may deny use of camp chapel for a Vietnam protest and memorial service when chapel had been used exclusively for religious services for sole benefit of military personnel); New Mexico ex rel. Norrell v. Callaway, 389 F. Supp. 821 (D.N.M. 1975) (commander of White Sands missile range, a "closed" base, may deny a State-sponsored group permission to enter the range to search for treasure trove); CCCO Western Region v. Fellows, 359 F. Supp. 644 (D. Cal. 1973) (leafleting not subject to a bar order on the public portions of San Francisco Presidio); Jenness v. Forbes, 351 F. Supp. 88 (D.R.I. 1972) (district court, having originally sustained a closed post's commander's exclusion of political campaigners, held exclusion arbitrary and capricious where Vice-President was admitted to the base in his capacity as a political candidate). See generally, Stine, Base Access and the First Amendment: the Rights of Civilians on Military Installations, 18 The A.F.L. Rev. 18 (Fall 1976).

560.424 U.S. 828 (1976). See generally Zillman and Imwinkleried, The Legacy of Greer v. Spock; The Public Forum Doctrine and the Principal of the Military's Political Neutrality, 65 Geo. L.J. 773 (1978).

561.424 U.S. at 836.

562.424 U.S. at 837.

563.424 U.S. at 851.

564.424 U.S. at 830.

565.424 U.S. at 837.

566.United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955), quoted in 424 U.S. at 838.

567.424 U.S. at 838.

568.424 U.S. at 838.

569.424 U.S. at 833 n.13.

570.424 U.S. at 839.

571.424 U.S. at 838 n.10.

572.433 U.S. 119 (1977).

573.433 U.S. at 134.

574.Id. A "threat to the order of security" of a prison or military installation is a reason to permit restriction of first amendment rights. A different rule obtains for public forums. See Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Persons for Free Speech at SAC v. U.S. Air Force, 675 F.2d 1010, 1020 (8th Cir.), cert. denied, 459 U.S. 1092 (1982), suggests that in a nonpublic forum, threats of this kind would be a valid distinction between groups although this would not be sufficient distinction in the public forum. Compare Tele-Communications of Key West, Inc. v. United States, 580 F. Supp. 11 (D.D.C. 1983) (holding that first amendment interests of cable company were limited in the absence of a public forum and the Air Force could rationally establish an interest in being served by only one cable television company).

575.675 F.2d 1010 (8th Cir.), cert. denied, 459 U.S. 1092 (1982).

576.675 F.2d at 1015-1016. But see Vaughn v. United States, No. Civ. 76-120 T.U.C. (D. Ariz. Sept. 10, 1981) (order granting injunction) (retired officer who was a candidate for office could not be stopped from driving on Davis-Monthan Air Force Base in a van with a sign advertising his candidacy in light of admission onto base of other persons and vehicles with political messages).

577.675 F.2d at 1017.

578.Id.

579.Id.

580.710 F.2d 1410 (9th Cir. 1983), cert. granted, 53 U.S.L.W. 3417 (U.S. Dec. 3, 1984).

581.710 F.2d at 1415.

582.Id. See also Brown v. Palmer, 689 F. Supp. 1045 (D. Colo. 1988) (Air Force "guest day" created temporary forum); rev'd, 915 F.2d 1435 (10th Cir. 1990).

583.Id.

584.710 F.2d at 1416.

585.472 U.S. 675 (1985).

586.Id. at 686.

587.See generally Cruden & Lederer, The First Amendment and Military Installations, 1984 Det. C.L. Rev. 845; Maizel & Maizel, United States v. Albertini and The First Amendment, The Army Lawyer, Aug. 1986, at 11.

588.Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 955 (1983) cited in United States v. Albertini, 710 F.2d at 1414.

589.DOD Dir. 1325.6, para. IIID. See also DA Pam 190-2, para. 4e.

590.307 F. Supp. 849 (D.S.C. 1969), aff'd mem., 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). See also Committee for G.I. Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974), rev'd, 518 F.2d 466 (D.C. Cir. 1975) (upholding, inter alia, a

regulation that authorized commanders to prohibit display on barracks walls of any posters constituting a clear danger to military loyalty, discipline or morale); Carlson v. Schlesinger, 511 F.2d 1327 (D.C. Cir. 1975) (upholding Air Force regulation requiring command authorization to circulate petitions on base, in uniform, or in a foreign country where the base commander determines such activity presents a clear danger to loyalty, discipline or morale).

591.In Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977), the court concurred with the Court of Military Appeals in United States v. Priest, 21 C.M.R. 564, 570, 45 C.M.R. 338, 344 (1972), that the correct standard to apply is the older "clear and present danger" test of Schenk v. United States, 249 U.S. 47, 52 (1919), which does not require imminence of harm. See also Parker v. Levy, 417 U.S. 733, 758-59 (1974), quoting United States v. Priest.

592.570 F.2d at 1018. Put another way, the issue is whether speech "tended to interfere with responsiveness to command or to present a clear danger to military, loyalty, discipline, or morale." 570 F.2d at 1017.

593.570 F.2d at 1018.

594.DOD Dir. 1325.6, para. III.

595.Id. para. IIIA2. See also United States v. Schneider, 27 C.M.R. 566 (A.B.R. 1958) (possession of pornography without evidence of attempt to distribute was insufficient ground for prosecution under UCMJ art. 134). Stanley v. Georgia, 394 U.S. 557 (1969) (mere private possession of obscene movie film not punishable). See generally DA Pam 190-2, para. 4a(1). Note that seizure of material not intended for distribution may not involve first amendment rights so much as a right to privacy and a fourth amendment right specifically. See DiGuiseppe v. Ward, 698 F.2d 602 (2d Cir. 1983).

596.DOD Dir. 1325.6, para. IIIC. See also DA Pam 190-2, para. 4d.

597.See, e.g., United States v. Priest, 21 C.M.A. 564, 45 C.M.R. 338 (1972) (serviceman editor of underground newspaper convicted of uttering disloyal statements with intent to promote disloyalty, in violation of art. 134, UCMJ). Content violations are chargeable under any of the following UCMJ articles: art. 82, soliciting desertion, mutiny, or sedition; art. 88, contemptuous

words against officials; art. 89, disrespect toward a superior commissioned officer; art. 92, failure to obey a lawful order or regulation (incorporating various service regulations on clearance, dissent, political activities); art. 134, disloyal statements, with intent to promote disloyalty; art. 134, clause three, which may incorporate: 18 U.S.C. ✍1381, enticing desertion; 18 U.S.C. ✍2387, counseling insubordination, disloyalty, mutiny, or refusal of duty; 18 U.S.C. ✍2388, causing or attempting to cause insubordination.

598.DOD Dir. 1325.6, para. IIIA1. The difference between demonstrative activity and distribution of literature may be difficult to discern. The distinction is discussed in United States v. Bradley, No. 13,574 (4th Cir. Nov. 28, 1969), digested in 70-1 Judge Advocate Legal Service 27.

599.AR 600-20, para. 5-9. DA Cir. 632-1, para. 6-4 listed interference with training or a troop formation as situations where a commander could invoke this test. The circular expired on 1 May 1976.

600.AR 600-20, para. 5-9.

601.The Judge Advocate General recommended this language for use in local implementing regulations: "Distribution on the reservation of publications, including pamphlets, newspapers, magazines, handbills, flyers, and other printed material, may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the post commander [or his authorized representative.]" 70-1 Judge Advocate Legal Service 27 (1970); 69-9 Judge Advocate Legal Service 15 (1969).

602.DOD Dir. 1325.6, para. IIIA3.

603.Id.

604.AR 600-20, para. 5-9. See also DAJA-AL 1976/4390 (29 April 1976) (The Judge Advocate General nonconcurrence with decision to overrule commander's delaying distribution of "About Face" at Fort Dix); DAJA-AL 1980/1861 (14 May 1980) (overruling delay of distribution of "Challenger"); DAJA-AL 1974/4188 (17 May 1974).

605.453 F.2d 345 (10th Cir. 1972).

606.Id. at 347. The court relied heavily on Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd mem., 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971), and Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), cert. denied, 401 U.S. 982 (1971). In Yahr, the court refused to grant a preliminary injunction against the commanding general of Fort Bragg, North Carolina, who would not allow distribution of an underground newspaper ("The Bragg Briefs") on post. The court commented that: "Within the military establishment, and under the regulation in question the commanding officer has primary responsibility for determining the impact of the newspaper on the men in the command." Id. at 691. See also Noland v. Irby, 341 F. Supp. 818 (W.D. Ky. 1971), aff'd., No. 71-1661 (6th Cir., Apr. 24, 1972), cert. denied, 409 U.S. 934 (1972).

607.DOD Dir. 1344.10, Political Activities by Members of the Armed Forces, encl. 1, para. 2 (23 Sept. 1969). Art. 138 of the Uniform Code of Military Justice, 10 U.S.C. ✍938, also protects service members' rights to submit grievances against their military commanders. DOD Dir. 1325.6, para. IIIF, reminds commanders that "a [service] member may petition or present any grievance to any member of Congress. . . ." See also DA FM 27-1, para. 9-7 ("a soldier may write or petition any member of Congress about any complaint. Commanders should not interfere with or attempt to dissuade a soldier from the exercise of this right)."

608.10 U.S.C. ✍1034.

609.511 F.2d 1327 (D.C. Cir. 1975). See also Allen v. Monger, 404 F. Supp. 1081 (N.D. Cal. 1975) (petitioning on-board ship off Vietnam could be regulated but not prohibited).

610.444 U.S. 348 (1980).

611.444 U.S. at 356.

612.444 U.S.at 356-357 n.14. See also Secretary of the Navy v. Huff, 444 U.S. 453 (1980) (companion case to Glines, sustaining Navy regulation requiring prior approval of distribution of petitions overseas, on and off base); United States v. Bowers, 590 F. Supp. 307 (N.D.N.Y. 1983) (conviction for reentry on installation after commander reviewed literature and found it presented a clear danger).

613.Standards for the wear of uniforms are prescribed in AR 670-1. According to AR 670-1, para. 1-7, "a neat and well-groomed

appearance by soldiers is fundamental to the Army, and contributes to building the pride and esprit essential to an effective military force." Para. 1-8 prescribes male and female standards concerning hair style and ornamentation. Para. 1-7b covers exceptions to appearance standards based on religious practices. See also AR 600-20, para. 5-6; Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (Air Force regulations prohibiting the wear of yarmulkes upheld); Bitterman v. Secretary of Defense, 553 F. Supp. 719 (D.D.C. 1982) (accord); Geller v. Secretary of Defense, 423 F. Supp. 16 (D.D.C. 1976) (wearing of beard by Jewish chaplain could not be restricted). There are no Army-wide regulations about the appearance of civilian employees, although local commands may establish policies which "relate to job performance, or 'efficiency of the service.'" DAJA-AL 1975/4775, 10 Oct. 1975, digested in The Army Lawyer, Feb. 1978, at 5. Compare Klotzbach v. Callaway, 473 F. Supp. 1337 (W.D.N.Y. 1979) (grooming standards applied to National Guard technician). In DAJA-AL 1975/4775, 10 Oct. 1975, supra, The Judge Advocate General reviewed a dress code for the Aschaffenberg Military Community in Germany and advised: "In an employment environment which includes direct customer contact or association with local national workers having deeply rooted cultural attitudes regarding dress and appearance, prohibition of on-the-job wear of some extreme items of apparel . . . could be supported. . . ." In DAJA-AL 1973/5207, 30 Nov. 1973, The Judge Advocate General advised against creation of a regulation that would have established a dress code for the Army.

614.For example, a grooming regulation prohibiting "extreme hairstyles," and "exaggerated sideburns," while enforcing "conservative styles that permit ready identification as males" or "traditional standards of good taste," is vulnerable to a vagueness challenge. JAGA 1969/3906, 9 May 1969 (advising that U.S. Army Hawaii regulation about dependent hair style was infirm). Similarly, a regulation requiring "traditional standards of good taste befitting an American Military Community" would be suspect. Id.

615.DAJA-AL 1977/5346, 24 Aug. 1977 (responding to inquiry about commissary dress code at Darmstadt, Germany). A sustainable regulation might require both males and females with hair over a certain length to wear a hair net before entering a swimming pool (health) or before working around a craft shop equipped with power machines (safety). JAGA 1969/3906, 9 May 1969. Commands may permit subordinate organizations to issue appearance standards. DAJA-AL 1977/5890, 23 Nov. 1971 (approving U.S. Army Europe

regulation authorizing subordinate command to establish local standards). In DAJA-AL 1977/5890, The Judge Advocate General observed that denial of access to post facilities of persons wearing unauthorized military clothing with civilian clothes would be permissible.

616.18 U.S.C. ✍1382.

617.AR 210-10, para. 6-2d, instructs the installation commander to "set aside suitable facilities . . . for use as dayrooms, . . . and [the installation commander] will prescribe rules governing their use." Para. 6-7 States that the installation commander "is responsible for the granting of privileges at facilities under his jurisdiction."

618.425 U.S. 238 (1976).

619.425 U.S. at 242-243.

620.425 U.S. at 247.

621.425 U.S. at 248.

622.425 U.S. at 247.

623.562 F.2d 838 (2d Cir. 1977) (en banc).

624.562 F.2d at 862.

625.Carey v. Population Serus. Int'l, 431 U.S. 678 (1977), cited in 562 F.2d at 861.

626.The Government has greater power to regulate in constitutional areas where its employees are concerned. Governmental authority recedes partially where the general public is concerned. The personal appearance cases cited here concerned restrictions on public employees, not the general public. Consequently, to the extent that appearance not amounting to symbolic expression is protected, the Government probably would have to apply a higher standard to control the appearance of members of the general public. This standard protects the public from arbitrary Governmental intrusion and, if anything, is more restrictive than necessary.

627.Miller v. School Dist., 495 F.2d 658 (7th Cir. 1974), quoted in 562 F.2d at 862.

628.562 F.2d at 858.

629.675 F.2d 1010 (8th Cir.), cert. denied, 103 S. Ct. 579 (1982).

630.675 F.2d at 1014 n.3.

631.Id.

632.675 F.2d at 1020 n.9 (quoting Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969)).

633.Appearance standards as they relate to the free exercise of religion are discussed in Folk, Military Appearance Requirements and Free Exercise of Religion, 98 Mil. L. Rev. 53 (1982). See also supra note 623. Whereas uniform standards have been upheld against free exercise challenges based on articulated military concerns with uniformity and military necessity, commanders should be cautious about interfering with the ability to observe religious dietary restrictions such as the Jewish precept of Kashruth. See, e.g., United States v. Kahane, 396 F. Supp. 587 (E.D.N.Y. 1975). While it may be possible to justify restrictions on a lesser standard than would apply in the civilian setting, mere administrative inconvenience would not overcome a legitimate claim to access.

634.AR 165-1, para. 3-1.

635.DAJA-AL 1978/2826 (11 Aug. 1978) digested in The Army Lawyer, Jan. 1977, at 8.

636.Id.

637.424 U.S. 828 (1976).

638.79 L. Ed.2d 604 (1984).

639.79 L. Ed.2d at 613.

640.79 L. Ed.2d at 615 & n.6.

641.DAJA-AL 1977/4871 (19 July 1977), as digested in The Army Lawyer, Dec. 1977, at 32; but see Jewish War Veterans of United States v. United States, 695 F. Supp. 3 (D.D.C. 1988) (display of large cross on hillside at Marine base violates Establishment Clause).

642.582 F. Supp. 463 (E.D.N.Y. 1984) aff'd in part, remanded in part, 755 F.2d 223 (2d Cir. 1985).

643.582 F. Supp. at 476.

644.AR 165-1, para. 3-3b.

645. AR 600-29, para. 4c, provides that except as otherwise authorized by Army regulations, religious organizations can solicit only in connection with religious services. AR 230-36 permits the maintenance of chaplains funds to support the chaplaincy's activities.

646. See McCollum v. Board of Educ., 333 U.S. 203 (1948).

647.AR 165-1, para. 3-3a.

648.AR 600-20, para. 5-6.

649.Id. at para. 5-6.

650.106 S. Ct. 1310 (1986). See Folk, The Military, Religion, and Judicial Review: The Supreme Court's Decision in Goldman v. Weinberger, The Army Lawyer, Nov. 1986, at 5; O'Neil, Civil Liberty and Military Necessity--Some Preliminary Thoughts on Goldman v. Weinberger, 113 Mil. L. Rev. 31 (1986).

651.Id. at 1313.

652.Id. at 1314. In response to Goldman v. Weinberger, Congress passed legislation requiring the Armed Services to allow the wearing of religious apparel by soldiers in uniform, except when the Secretary concerned determines: (1) that the wearing of the item would interfere with the performance of the member's military duties, or (2) that the item of apparel is not neat and conservative. Defense Authorization Act of 1988 and 1989, Pub. L. No. 100-180, ✍ 508, 101 Stat. 1087 (1987) (to be codified at 10 U.S.C. ✍ 774). This statute has been implemented in AR 600-20, para. 5-6.

653.AR 210-10, para. 5-5a; AR 210-7, para. 2-1. AR 210-7 is partially derived from DOD Dir. 1344.7. AR 210-7 is codified at 32 C.F.R. 552.50-83. One significant restriction on solicitation is that commercial activities may not sell or deliver goods that would conflict with goods and services provided in post exchanges.

AR 60-10, para. 3-2. See also DAJA-AL 1983/2011 (31 May 1983) (response to congressional inquiry explaining that pizza deliveries would conflict with installation services).

654.AR 210-7 does not regulate the activities of the Army and Air Force Mutual Aid Association. Id. Para. 1-2d(3). Restrictions imposed by other regulations, such as AR 600-20, para. 5-22, and AR 600-50, paras. 1-5(e), 2-1(e), and 2-1(h), continue to apply to this and other organizations. See, e.g., DAJA-AL 1981/3443 (26 Aug. 1981) (precluding sales element from official educational program).

655.AR 210-10, para. 5-5b. See also AR 600-50, para. 2-1; regarding prohibition against solicitation of junior soldiers.

656.Id. at para. 5-5d.

657.Id. at para. 5-5e.

658.AR 210-7, para. 2-2b(1).

659.Id.

660.Id. at para. 2-4.

661.Id. at para. 2-5a. Whereas para. 2-4 allows either the installation commander or a designee to demand and receive evidence of compliance with State requirements, para. 2-5a states only that the installation commander authorize solicitation, suggesting that personal action is required. See infra note 141.

662.Id. at para. 2-5a.

663.Id. at para. 2-7a.

664.Id. at para. 2-8c.

665.This requires personal action by the commander. DAJA-AL 1974/5557 (16 Jan. 1975); DAJA-AL 1974/5160 (11 Nov. 1974).

666.AR 210-7, para. 4-1. See, e.g., DAJA-AL 1975/5470 (19 Jan. 1976), digested in 76-7 Judge Advocate Legal Serivce 35 (revocation appropriate where solicitor invited client to off-post dinner).

667.Id. at para. 4-1b.

668.Id. at para. 2-8f(2).

669.Id. at para. 2-8f(3).

670.Id. at para. 2-8f(4).

671.Id. at para. 2-8f(8).

672.Id. at para. 2-8f(9).

673.Id. at para. 4-1d.

674.Id. at para. 4-1c.

675.Id. at para. 4-5.

676.Id. at para. 4-4.

677.Id. at para. 4-7.

678.Id.

679.Id. at para. 4-6a.

680.18 U.S.C. ✍1382.

681.See AR 190-24. AR 210-7, para. 4-9, notes the availability of off-limits sanctions for "cash or consumer credit transactions" by off-post businesses which are "usurious, fraudulent, misleading, or deceptive." This should not suggest that off-limits sanctions would not be an appropriate additional sanction for on-post solicitors whose business operations extend off-post as well.

682.AR 210-7, chap. 3. See also DOD Dir. 1344.1 (codified at 32 C.F.R. 276.1-7). Problems with the sale of life insurance on installations are discussed in Report and Recommendations on Regulating the Sale of Commercial Life Insurance on Military Reservations, Subcomm. for Special Investigations, House Armed Services Committee, 84th Cong. 1st Sess. (Comm. Print 1955).

683.AR 210-7, para. 3-5a(1). "State" includes Territories and Puerto Rico.

684.Id. at para. 3-1.

685.Id. at para. 3-10.

686.Id. at para. 3-9.

687.Id. at para. 3-14.

688.JAGA 1962/4001 (20 June 1982), digested in 104 Judge Advocate Legal Service 7.

689.32 C.F.R. ✍634.3(C)(3).

690.Central Hudson Gas v. Public Service Comm'n, 447 U.S. 561 (1980) (citing Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

691.Ohlarik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-456 (1978), cited in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980).

692.Ohlarik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 457 (1978), cited in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 563 (1980).

693.Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 563-564 & n.6 (1980).

694.Id.

695.Id. at 564.

696.Id. at 566.

697.American Future Sys. v. State Univ. of New York College at Cortland, 565 F. Supp. 754, 761 (N.D.N.Y. 1983) (citing American Future Sys. v. Pennsylvania State Univ., 464 F. Supp. 1252 (M.D. Pa. 1979), aff'd, 618 F.2d 252 (3d Cir. 1980)).

698.E.g. Metromedia, Inc. v. City of San Diego, 453 U.S. 190 (1981); Central Hudson Gas v. Public Service Comm'n, 447 U.S. 561 (1980). AR 405-80, para. 2-12, States that the DA "will not authorize the posting of notices or erection of billboards or signs for commercial purposes . . . ."

699.Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464-467 (1978) (in-person lawyer solicitation could be prohibited, in part because "(u)nlike a public advertisement, . . . in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.")

700.American Future Sys. v. State Univ. of New York College at Cortland, 565 F. Supp. 754, 767-768 (N.D.N.Y. 1983).

701.No. 76-56-NN (E.D. Va. Dec. 14, 1977), aff'd, No. 78-1205 (4th Cir. Oct. 23, 1978).

702.Id. slip op. at 1.

703.Id. slip op. at 2.

704.U.S. Const. art. I, ✍8, cl. 14.

705.5 U.S.C. ✍301. See also 10 U.S.C. ✍3012g.

706.United Military Ass'n v. Alexander, No. 76-56-NN, slip op. at 5 (E.D. Va. Dec. 14, 1977), aff'd, No. 78-1205 (4th Cir. Oct. 23, 1978).

707.Under review was AR 210-8, para. 3-1(a), currently contained in AR 210-7, para. 3-2a.

708.United Military Ass'n v. Alexander, No. 76-56-NN, slip op. at 5 (E.D. Va. Dec. 14, 1977), aff'd, No. 78-1205 (4th Cir. Oct. 23, 1978).

709.424 U.S. 828 (1976).

710.407 U.S. 197 (1972).

711.United Military Ass'n v. Alexander, No. 76-56-NN, slip op. at 7 (E.D. Va. Dec. 14, 1977), aff'd, No. 78-1205 (4th Cir. Oct. 23, 1978).

712.In an analogous case, American Future Sys. (AFS) v. Pennsylvania State Univ., 618 F.2d 252 (3d Cir. 1980), a company which sold tableware was barred from doing business in dormitories at a university except when invited by an individual student. The court, relying in part on Greer v. Spock, held that the residence

halls were not public forums for commercial speech. Although it added an additional test to Spock, requiring that commercial speech cannot be barred from "nonpublic forum" areas where it "does not significantly impinge upon the primary business carried on there," 618 F.2d at 256 (citing Greer v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., concurring)), the court nevertheless concluded that the University's interests supported the partial ban. 618 F.2d at 257. But see AFS v. State Univ. of New York College at Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983) (holding, without discussing the public forum issue, that AFS could not be completely barred from residence halls). Subsequently, AFS was given permission to hold demonstrations in common rooms in the residence halls subject to University censorship. AFS v. Pennsylvania State Univ., 688 F.2d 907, 911 (3d Cir. 1982). In the subsequent action by AFS to enjoin the censorship, the Third Circuit applied the constitutional test for restrictions on commercial speech to the censorship, apparently finding that the University, having admitted AFS to the common areas, had to now treat the proposed conduct as protected commercial speech. American Future Sys. v. Pennsylvania State Univ. 688 F.2d 907, 912-913 (3d Cir. 1982). The court found the censorship unrelated to substantial Government interests. 688 F.2d at 913. This second opinion, if applied to the Army's solicitation policy, would require that once solicitors are admitted to an installation, the restrictions in AR 210-7 be weighed against standards applicable to regulation of commercial speech, contrary to the holding in United Military Association.

713.In AFS v. Pennsylvania State Univ. 618 F.2d 252 (3d Cir. 1980), the court rejected the argument that because some political activity was allowed in the residence halls, commercial speech could not be excluded. The court correctly differentiated commercial speech as having less protection than traditional speech. In the military context, the reverse argument has never been considered: if commercial speech is permitted on the military installation, can traditional speech be excluded? Cf. Tele-Communications of Key-West v. United States, 580 F. Supp. 11 (D.D.C. 1983) (holding first amendment interest of cable company were outweighed by military interest and that base could limit access to only one company).

714.DOD Dir. 5120.4 (codified at 32 C.F.R. 202.1-15). AR 360-81, chap. 3, controls the establishment and operation of Corps of Engineers (CE) publications within the Army.

715.AR 360-81, para. 3-29b.

716.AR 360-81, para. 3-29b.

717.AR 360-81, para. 3-5a.

718.AR 360-81, para. 3-22.

719.AR 360-81, para. 3-28.

720.791 F.2d 1466 (11th Cir. 1986).

721.Id. at 1476.

722.Id.

723.Surplus Salvage Sales, Inc. v. Cooper, No. 81-71-CIV-4, slip op. (E.D.N.C. Nov. 8, 1981) (order granting preliminary injunction).

724.Id.

725.Id. But see Washington Mercantile Ass'n v. Williams, 733 F.2d 687 (9th Cir. 1984) (State's prohibition on advertisements by out-of-State drug paraphernalia business lawful).

726.AR 210-1, para. 4-2.

727.AR 210-50, para. 3-36; AR 210-7, para. 2-8(f)(17).

728.Message, HQDA, DAAG-DPS, 041530 Apr. 84, subject: Home Business Sales in Family Quarters.

729.Home sales activity is generally prohibited overseas because "unique problems . . . do exist overseas associated with the use of the military postal system for personal commercial gain and with host country officials concerned over the importation of duty free goods destined for release for profit." Id. at para. 3.

730.Id. at para. 4. The message also notes that over 50% of Army spouses were working as of 1984.

731.Id. at para. 2.

732.See AR 600-50.

733.AR 600-29, para. 1. See also Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (1982).

734.AR 600-29, app. A, para. C3(a). The Combined Federal Campaign is optional for installations with less than 200 personnel. Id. at para. A2(c), E4(d).

735.See, e.g., NAACP Legal Defense & Educ. Fund, Inc. v. Devine, 727 F.2d 1247 (D.C. Cir. 1984).

736.See, e.g., National Health Agencies' Comm. for the Combined Fed. Campaign v. Campbell, 564 F. Supp. 900 (D.D.C. 1982).

737.AR 600-29, para. 1. See also AR 600-29, app. A, paras. 4f, 4h, 5c, 5d, 5e, 5g, 5j, 5l,(4), and app. A, para. A4. "Thermometers," which indicate the amount of giving, are permissible at installation (or presumably activity) level but may not indicate the standing of subordinate organizations. AR 600-29, para. 5l(5).

738.Exec. Order No. 12,353, 47 Fed. Reg. 12,785 (1982). See AR 600-29, para. 8.

739.AR 600-29, para. 8.

740.AR 600-29, para. 8a. See AR 930-4.

741.AR 600-29, para. 8b. Commanders also can permit private organization benefits on post. AR 600-29, para. 8c. See also DAJA-AL 1981/2748 (14 May 1981), digested in The Army Lawyer, Oct. 1981, at 18, (commercial carnival used as fund-raising source for morale support activities).

742.See AR 600-29, app. A, para. A1(a)(1), C1. Para. C1 defines voluntary agencies, as "private, nonprofit, self-governing organizations financed primarily by contribution from the public."

743.AR 600-29, app. A, para. C6. Dual solicitation--participation in the major campaign and additional independent solicitation--is not authorized.

744.Id. at para. C6(a). Door to door solicitation is at the discretion of the installation commander. See also DAJA-AL 1977/4330 (24 May 1977), digested in The Army Lawyer, Oct. 1977, at 10.

745.AR 600-29, app. A, para. C6(b). Sale of token items like poppies by veterans organizations is an example.

746.Id. at para. C6(a) provides that family quarters solicitation "may not be conducted by military or civilian personnel in their official capacity during duty or nonduty hours, nor may such solicitation be conducted as an official command-sponsored project." An apparent exception is establishing collection boxes for the voluntary donation of foods or goods for worthy causes or participating in other activities to assist "the unfortunate." AR 600-29, para. 4. Id. Additionally, Federal personnel are encouraged to otherwise participate in voluntary agency work "consistent with Federal agency policy and prudent use of official time." Id. at para. A3. See also DOD Dir. 5410.18, paras. VC2 (codified at 32 C.F.R. 237.4(a)(3) and 237.4(c)(3)).

747.Id. See also app. A, para. A3.

748.AR 600-29, para. 4c.

749.Id.

750.DOD Dir. 5410.18, para. VC (codified at 32 C.F.R. 237.4(a)(3). See AR 360-61, para. 4-17.

751.DOD Instr. 5410.19, para. Fla(5) (codified at 32 C.F.R. 238.6(a)(1) note).

752.Id.

753.Id.

754.AR 190-24, para. 2-7a. AR 190-24 is a joint service regulation codified at 32 C.F.R. 631.1-21.

755.AR 190-24, para. 2-7b.

756.Id.

757.AR 190-24, para. 2-5b, app. B, para. B-5a. Discrimination complaints based on race, color, sex, religion, age, or national origin which are made to the Armed Forces Disciplinary Control Boards (AFDCB) will be reported by the AFDCB to the local commander immediately. Immediate notification to the local commander is not required in the case of other adverse conditions.

The attention of major commanders is particularly drawn to drug paraphernalia sources; they are directed to ensure that subordinate commanders assess the availability of paraphernalia in their areas. AR 190-24, para. 2-2a(7).

758.AR 190-24, para. 2-1a.

759.AR 190-24, para. 2-1b. The commander responsible for a joint service AFDCB is referred to as the "sponsoring commander."

760.AR 190-24, para. 2-4a, app. B, para. B-4a.

761.AR 190-24, para. 2-7b, app. B, para. B-6o.

762.AR 190-24, para. 2-7d, app. B, para. B-6b.

763.AR 190-24, para. 2-7e, app. B, paras. B-6c, B-6e.

764.AR 190-24, app. B, para. B-6f--B-6h.

765.AR 190-24, app. B, para. B-6k.

766.AR 190-24, app. B, para. B-6k.

767.AR 190-24, app. B, para. B-6n.

768.AR 190-24, para. 2-7c.

769.AR 190-24, app. B, para. B-7.

770.Id. Although AR 190-24 does not explicitly require AFDCB action sua sponte, the requirement for quarterly evaluation of off-limits establishments implies it.

771.157 F.2d 97 (4th Cir. 1946).

772.157 F.2d at 101.

773.Id. The result in the case, reversal of the district court's grant of a preliminary injunction against the joint disciplinary control board, was based on the ground that the United States had not consented to suit against itself. The result would be different today because the United States has waived sovereign immunity for equitable actions. See 5 U.S.C. ✍702. In Harper v. Jones, 195 F.2d 705 (10th Cir.), cert. denied, 344 U.S. 821

(1952), the Government appealed a preliminary injunction against an order by the Commander of Fort Sill declaring a used car business off-limits after it allegedly defrauded a lieutenant by selling him a used, rather than new, car. The district court was reversed on the same ground as in Ainsworth v. Barn Ballroom Co.--that the suit was barred by sovereign immunity. Nevertheless, in dicta, the court also held off-limits action to be a lawful exercise of executive authority and the application of off-limits authority in the specific circumstances lawful:

> We think it clear that the regulations gave the General, for the health and welfare of the troops under his command, power and authority to declare the establishment of the plaintiffs "off limits."

195 F.2d at 707.

774.In Metlin v. Palastra, 729 F.2d 353 (5th Cir. 1984), the court suggests that there is no property interest with which the military interferes when soldiers are ordered not to do business with a particular establishment. In Treants and Associates, Inc. v. Cooper, No. 82-57-CIV-4 (E.D.N.C. Oct. 28, 1982) (order denying motion to dismiss), the complaint against Camp LeJeune's off-limits action for instances of prostitution and solicitations of prostitution survived a motion to dismiss in part because the court concluded that there could be a liberty interest raised by the stigma which accompanies an off-limits declaration. Also, in Wantland v. Gravely, No. 76-95-T (S.D. Cal. May 19, 1976) (order granting in part and denying in part motion to dismiss), a court found that economic loss was sufficient to give a merchant standing to press claims under the APA and the due process clause.

775.In Treants and Associates, Inc. v. Cooper, No. 82-57-CIV-4 (E.D.N.C. Oct. 28, 1982) (order denying motion to dismiss), the notice to adult book store owners was inadequate because although the notice identified an imminent threat to military personnel for instances of prostitution and solicitations of prostitution, details concerning these transactions were absent. The court also identified the possibility of a failure of the Army to give initial notice of the off-limits action and an opportunity to cure and a failure to undertake informal corrective measures first. In Doe v. Fulham, No. 83-137-CIV-4 (E.D.N.C. July 3, 1984) (order granting summary judgment), a Marine and the operator of an off-limits "adult" establishment challenged the decision by Camp LeJeune that the sale of sexually explicit materials and limited

means of access and exit hazarded the discipline, health, morale, safety, morals or welfare of Marine patrons. The court declined to review the claims based on Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). In considering whether to review, the court observed that the operator's first amendment claim was derived from the right of the Marine and while there was a constitutional interest, it was weak and the danger of irreparable harm to the Marine if denied access to sexually-explicit material was small. Continuing, the court concluded that the off-limits decision was exclusively within the discretion of military authorities to make and that commanders--not the courts--are specifically trained and equipped to decide what is required to maintain proper military discipline. In Wantland v. Gravely, No. 76-95-T (S.D. Cal. May 19, 1976) (order granting in part and denying in part motion to dismiss) the court concluded that a merchant who could only demonstrate economic loss could not assert the first amendment rights of Marines kept from the Capri Tavern, an establishment near Camp Pendleton, which was allegedly a gathering place for homosexuals.

776.In the Criminal Proceedings v. Shuhmann for Insult, R Reg. 2 St 140/82 (VerfGH Bayern Mar. 7, 1983).

777.StGB ✍185.

778.AR 190-5 (codified at 32 C.F.R. pt. 634) is the principal reference. See also AR 385-55 (principally pertains to Army vehicles). The Department of Defense Directive on which the previous edition of the Army regulation was based was upheld in Royal Standard Life Ins. Co. v. McNamara, 344 F.2d 240 (8th Cir. 1965).

779.AR 190-5, para. 3-1.

780.AR 190-5, para. 3-2.

781.Installation vehicle codes should, where possible, conform to the law of the State. AR 190-5, para. 4-2.

782.AR 190-5, para. 3-4.

783.AR 190-5, para. 3-4.

784.AR 190-5, chap. 5.

785.AR 190-5, para. 5-3.

786.AR 190-5, para. 2-5.

787.AR 190-5, para. 2-5.

788.AR 190-5, para. 2-6.

789.AR 190-5, para. 2-6.

790.AR 190-5, para. 2-3 (codified at 32 C.F.R. ✍634.2(c)).

791.AR 190-5, para. 2-5.

792.AR 190-5, para. 2-6.

793.AR 190-5, paras. 2-5.

794.AR 190-5, para. 2-7.

795.AR 190-5, paras. 4-1, 4-2. Some State statutes provide that installation commanders can set speed limits. When a commander acts in accordance with such a statute, violations are clearly punishable under the statute. DAJA-AL 1977/6340, 30 Jan. 1978. Even where the statute does not name commanders as local authorities who can set limits, violations may still be enforceable. See infra para. 2-19, notes 413-416.

796.See JAGA 1963/3678 (8 Mar. 1963), digested in 125 Judge Advocate Legal Service 11 (1963) (discussing withdrawal of operators' permits under the Civilian Personnel Regulations then applicable).

797.See AR 210-16; AR 210-50; AR 210-12.

798.AR 210-50, para. 3-5, table 3-3. Table 3-3 lists the priorities to be considered in assigning quarters. Additional considerations include the grade of the soldier and size and composition of the family.

799.AR 210-50, para. 3-17a. The "minimum acceptable overall occupancy rate" for adequate family housing is 98%. AR 210-50, para. 4-1a.

800.AR 210-50, para. 3-17a through 3-17f. Purchase of a house or mobile home precludes involuntary assignment.

801.AR 210-50, para. 3-17f.

802.AR 210-50, para. 3-7a. AR 210-12, para. 2-3b, prescribes that when inadequate public quarters are occupied by uniformed soldiers and their families no more than 75% of the Basic Allowance for Quarters (BAQ) shall be forfeited.

803.AR 210-11, para. 3-7c.

804.AR 210-11, para. 3-8g.

805.AR 210-11, para. 3-18. Only personnel in grades E-6 or below can be involuntarily assigned.

806.AR 210-11, paras. 3-8b,3-15a. Except for civilians employed in key and essential positions, occupancy terminates after five years. AR 210-11, para. 3-15b.

807.AR 210-11, para. 3-14a.

808.AR 210-11, para. 3-8c.

809.AR 210-11, para. 3-8d.

810.AR 210-11, para. 3-16.

811.AR 210-11, paras. 3-8c(1), 3-8d, 3-14b. See AR 210-12. Contractor personnel pay rent wherever the quarters are located. Family housing anywhere can be rented to civilian employees when it is excess. AR 210-50, para. 3-20.

812.AR 210-11, paras. 3-17, 3-18.

813.AR 210-50, para. 3-26a(2).

814.AR 210-11, para. 3-19a(2).

815.AR 210-11, para. 3-19c; AR 210-50, para. 3-26c. In terminations of unaccompanied quarters, only civilians are entitled to 30 days notice, and then only "whenever possible."

816.AR 210-50, para. 3-26b(2).

817.AR 210-50, para. 3-26b(3). An example of misuse would be use of quarters for unlawful commercial activity or renting assigned

family quarters for gain. See AR 210-7, para. 2-8f(17); DAJA-AL 1977/2553 (30 Apr. 1976), digested in The Army Lawyer, Apr. 1980, at 34, (concerning unlawful rental of quarters). But note that "cottage" industries generally should be approved in the United States. See supra para. 2-17, notes 197, 198.

818.AR 210-11, para. 3-19a(4). In this connection, commanders can direct that quarters be inspected to determine compliance with post heating and cooling guidelines. DAJA-AL 1979/2985 (16 July 1979), digested in The Army Lawyer, Apr. 1980, at 35. Discretion is given to major commands to identify other criteria for termination. Para. 3-19a(7). With one exception, the criteria for termination in para. 3-19a only apply to soldiers. Criteria for terminating civilian quarters are unclear. Para. 3-19c, which is primarily a notice provision, States that "Civilian employees will be notified in writing to vacate . . . quarters at the discretion of the installation commander." This provision seems to give broad authority to the commander in the absence of clearer criteria.

819.JAGA 1963/3601 (15 Feb. 1963), digested in 123 Judge Advocate Legal Service 10.

820.305 F. Supp. 564 (D. Mass. 1969).

821.AF Reg. 30-6, para. 11, provided for termination when "there exists misconduct on (the sponsor's) part or that of his dependents involving misuse of family housing or other conduct contrary to safety, health, and morals."

822.305 F. Supp. at 566.

823.305 F. Supp. at 567. See also United States v. County of Humboldt, 445 F. Supp. 852 (N.D. Cal. 1978) (quarters issued to service members for benefit and convenience of United States).

824.See generally Graham v. Richardson, 403 U.S. 365, 374 (1971).

825.See Board of Regents v. Roth, 408 U.S. 564 (1972).

826.677 F.2d 957 (2d Cir. 1982).

827.Of particular significance is the fact that the district court held there was no property interest in the prison apartments, relying on Hines v. Seaman. See 522 F. Supp. 57 (S.D.N.Y. 1981).

828.See 37 U.S.C. ✍101 (25).

829.The Judge Advocate General has advised that there is no property interest in Government quarters. DAJA-AL 1979/1877 (2 Mar. 1979), digested in The Army Lawyer, Oct. 1979, at 12. The rationale of the opinion is that quarters are furnished for the benefit and convenience of the United States and not of the individual. Because a property interest does not arise from unilateral expectation of a benefit, Board of Regents v. Roth, 408 U.S. 564, 577 (1972), there is no property interest in the quarters.

830.AR 210-50, para. 3-32. Although AR 210-50 addresses remedial actions to be taken when there is a failure to terminate, AR 210-11, relating to unaccompanied housing, does not. Nevertheless, the procedures in AR 210-50 logically apply in either situation.

831.AR 210-50, para. 3-33.

832.AR 210-50, paras. 3-33, 3-34. See also U.S. Attorney's Manual, ✍ 5-1.310A1a (authorizing direct action by U.S. attorneys in "actions to recover possession of property from tenants, squatters, trespassers, or others, and action to enjoin trespasses on Federal property").

833.10 U.S.C. ✍1074(A); AR 40-3, para. 4-1. Reserve and National Guard personnel also have limited entitlement. Para. 4-2.

834.10 U.S.C. ✍1074(b), AR 40-3, para. 4.11 (retirees); 10 U.S.C. ✍1076(a), 1076(b); AR 40-3, para. 4-12 (family members).

835.10 U.S.C. ✍1076(c). Although contained within ✍1076, which pertains exclusively to family members, the authority of the officer in charge logically applies to retirees' eligibility as well.

836.AR 40-3, para. 4-18. Local facilities are presumed inadequate where more than 30 miles away or where there is, on average, less than one dentist per 2,000 population.

837.AR 40-3, paras. 4-20, 4-22.

838.State rules concerning certification of emergency medical service (EMS) personnel are binding on civilian EMS personnel if they are civil servants, but do not affect service members who

provide EMS as part of the Federal function to serve military medical needs. See DAJA-AL 1984/2209 (19 July 1984).

839.JAGA 1969/4646 (26 Nov. 1969).

840.Id. The opinion was in response to a query from Fort Sill asking whether a retiree apprehended for drunk driving and larceny could be barred from Fort Sill, including the medical treatment facility and commissary. See supra note 555.

841.This would have to be a decision by the medical treatment facility commander, not the installation commander. Although JAGA 1969/4646 suggests that misconduct in the facility could warrant the installation commander's bar from the installation, it appears that absent action by the medical treatment facility commander, the installation commander can only issue a tailored bar letter. Because the statute clearly creates an expectancy in treatment, some measure of due process ought to be given before terminating medical or dental privileges. Note that AR 640-3, para. 4-1b provides that suspension of medical benefits is not authorized. In the context of AR 640-3, this prohibition appears to address only the installation commander's powers.

842.JAGA 1962/4104 (20 June 1962). Although the opinion is not framed in terms of space, facilities, and staff, the same rationale that would apply to misconduct in a facility applies to this context as well.

843.10 U.S.C. ✍4711; AR 600-10, para. 8-2a.

844.See AR 600-33.

845.AR 40-2, para. 4-4a(2).

846.AR 40-2, para. 4-4b.

847.AR 40-2, para. 4-4c. Note that an autopsy on military personnel whose remains are found off-post not performed for a military purpose may violate the Posse Comitatus Act, 18 U.S.C. ✍1385. DAJA-AL 1979/2893 (27 June 1979), digested in The Army Lawyer, Oct. 1979, at 11.

848.AR 40-3, para. 2-24a. Military personnel are subject to orders to submit to treatment. See DAJA/AL 1973/3694 (4 Apr. 1973), digested in The Army Lawyer, Oct. 1973, at 34.

849.AR 40-3, para. 2-24b.

850.AR 40-3, para. 2-24d. A somewhat related issue to consent to medical care is a terminal patient request to withhold or terminate life-sustaining procedures. DAJA-AL 1978/2402 (8 May 1978), digested in The Army Lawyer, Sept. 1978, at 29, advised that such requests should not be honored by military medical personnel. On areas subject to Federal legislative jurisdiction, the granting of such a request would likely constitute a criminal homicide under Federal law, even where a State statute provides immunity for health-care providers in these circumstances. Regardless of the applicability of Federal criminal laws, military physicians would face liability under the UCMJ. Where a physician is not liable to either Federal or military criminal laws, State statutes must be carefully examined to determine whether the Army health-care provider falls under the statutes in question.

851.AR 40-3, para. 2-24d(5).

852.AR 40-3, para. 2-24d(1).

853.Id.

854.AR 40-3, para. 2-24d(3).

855.Id. at para. 2-24d(4).

856.AR 40-3, para. 2-24d(6).

857.Id.

858.AR 40-3, para. 2-24d(8).

859.See AR 30-19 (commissary); AR 60-20 (exchange); AR 215-1 and AR 215-2 (morale, welfare, and recreation activities and nonappropriated fund activities).

860.See AR 60-20, para. 2-14.

861.AR 640-3, chap. 4. But see AR 210-60, dealing with check cashing privileges. In connection with check cashing privileges, AR 210-60, para. 2-5a, provides that a sponsor cannot be held liable for acts of family members except when a valid agency relationship exists. See DAJA-AL 1981/2627 (28 Apr. 1981), digested in The Army Lawyer, Mar. 1982, at 20; DAJA-AL 1978/2414

(26 Apr. 1978), digested in The Army Lawyer, Dec. 1978, at 17. When an agency relationship exists is up to local interpretation. Thus, an installation commander might presume an agency relationship exists where a check is drawn on a joint account and the sponsor is present in the command. Note that the Army and Air Force Exchange Service (AAFES) will suspend sponsor check cashing privileges despite AR 210-60, on the theory that AAFES regulation is based on independent authority under AR 60-20, permitted to be exercised by AR 210-60, para. 1-1b(b). See DAJA-AL 1983/1339 (29 Mar. 1983).

862.AR 640-3, paras. 4-3b(2), 4-6. Only the installation commander can suspend privileges; a sponsor cannot suspend his or her family members' privileges. DAJA-AL 1978/2772 (8 June 1978), digested in The Army Lawyer, Dec. 1978, at 17.

863.AR 640-3, paras. 4-4a, 4-4b(1)(a).

864.AR 640-3, paras. 4-4b(1)(c), 4-4c(2).

865.AR 640-3, para. 1-20e, 4-1a.

866.AR 640-3, para. 4-4b(3).

867.AR 640-3, para. 4-4b(4).

868.AR 640-3, para. 4-1f.

869.See AR 640-3, figures 4-3 through 4-6. The model letters refer to a right to submit matters concerning the subject of a suspension directly to the installation commander, although figure 4-7 refers to a right to submit matters to the designated representative prior to suspension action being taken. To limit possible challenges, installations should consider providing initial notice and an opportunity to submit matters in writing prior to suspension, followed by a right to appeal to the installation commander.

870.AR 640-3, para. 4-4c(3).

871.At Fort Sheridan, a Juvenile Case Management Team considers cases of juvenile misconduct and may recommend suspension of post privileges. Fort Sheridan Reg. 27-1 (9 Apr. 1981). The Fort Gordon Military Tribunal attends to traffic offenses, fishing and hunting offenses, and other misdemeanors. U.S. Army Signal Center

and Fort Gordon Reg. 27-2 (20 Jan. 1982). Other installations, such as Fort Benning and Fort Meade, rely on a "military magistrate" who exercises broader jurisdiction. See B.J. Carroll, The Fort Benning Military Magistrate--A New Step in Procedural Due Process for the Soldier (unpublished); Fort Meade Reg. 27-30 (undated).

872.AR 210-10, para. 2-9.

873.See supra para. 2-14.

874. See also DOD Dir. 5200.8, Security of Military Installations (July 29, 1980).

875.Congress has recognized military personnel as law enforcement personnel by including them under the Federal Tort Claims Act for any intentional torts they might commit. 28 U.S.C. ✍2680h. See also United States v. Di Re, 332 U.S. 581 (1948).

876. In DAJA-AL 1984/2412 (3 Aug. 1984), The Judge Advocate General advised that State laws cannot limit the on-post apprehension authority of military police as to military personnel or civilians "who threaten or impede the normal functioning of the command by conduct which is criminal or otherwise proscribed by appropriate regulations." This position is at odds with the decisions of a magistrate in United States v. Lucas, No. 5-81-125 MB (N.D. Cal. Sept. 23, 1981), and United States v. Schmidt, No. 5-81-539 MB (N.D. Cal. Aug. 18, 1982), that Navy security police at Moffett Field Naval Air Station could not arrest military or civilian offenders for State offenses because under Cal. Penal Code ✍830.9 (West 1984), they did not qualify as "peace officers" who have powers of arrest under California law. Subsequently, in United States v. Voss, No. CR-84-2051 MAG (N.D. Cal. Aug. 16, 1984), and United States v. Brockman, No. 84-2052 MAG (N.D. Cal. Aug. 30, 1984), another magistrate held in the case of Fort Ord military police that they had apprehension authority over both military and civilian offenders who violate State law on military installations, relying on traffic supervision regulations. See 32 C.F.R. pt. 634. Note that the military police may only take civilian offenders into temporary custody. See supra note 345. Thus, military police authority is limited to the power to apprehend.
This equates to the term "arrest" generally used in State statutes, which has a different meaning in military practice.

877.18 U.S.C. ✍1382.

878.539 F.2d 14 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). See also Kennedy v. United States, 585 F. Supp. 1119, 1123 (D.S.C. 1984) (concluding, based on AR 210-10 and AR 600-40 that military police "possess all powers that civilian law enforcement officers have on military property").

879.539 F.2d at 16 (footnotes and citations omitted). See also United States v. Matthews, 615 F.2d 1279 (10th Cir. 1980) (larceny conviction affirmed despite lengthy detention by military authorities before civilian apprehension).

880.UCMJ, art. 7, defines apprehension as "the taking of a person into custody." Arrest means restraint of longer duration based on an order. UCMJ, art. 9(a).

881.UCMJ art. 7(b) authorizes the apprehension of persons subject to military law and UCMJ art. 9(c) refers to confinement of civilians subject to military law. See also R.C.M. 302, 304. UCMJ arts. 2(a) (10-12) provide for jurisdiction over civilians. See also R.C.M. 202. Nevertheless, as limited by the Supreme Court (See McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957)), jurisdiction over civilians is likely limited to wartime overseas. Consequently, these provisions will not support apprehension authority in other circumstances.

882.18 U.S.C. ✍1385.

883.18 U.S.C. ✍3053.

884.18 U.S.C. ✍3052.

885.40 U.S.C. ✍318.

886.Civilian employees of the Department of Defense can carry firearms when on designated duties. 10 U.S.C. ✍1585. See AR 190-14.

887.United States v. Burgos, 269 F.2d 763 (2d Cir. 1959);

888.316 F.2d 113 (9th Cir. 1963).

889.Id. at 117. See also Alexander v. United States, 390 F.2d 101 (5th Cir. 1968); United States v. Lodewijkx, 230 F. Supp. 212 (S.D.N.Y. 1964).

890.JAGA 1952/4398 (13 June 1952), digested in 2 Dig. Ops. Mil. Security, ✍20.1.

891.Op JAGN 1951/38 (26 Nov. 1951), digested in 1 Dig. Ops. Mil. Security, ✍20.1. See Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil L. Rev. 85, 103 (1960).

892.U.S. Civil Service Commission, Position Classification Standards, GS-083, at 2 (Aug. 1974).

893.U.S. Civil Service Commission, Position Classification Standards, GS-085, at 3 (June 1968).

894.Id. at 3-4.

895. Contractor personnel cannot perform "Governmental functions." Consequently, "contract guard" duties should not include the exercise of discretionary application of Government authority in the general enforcement of laws and regulations. One issue that arises in connection with use of contract guards and policemen is the liability of contractors for misdeeds. In Riklon v. Washington Patrol Service, No. 1982-127 (High Court, Rep. of Marshall Islands Apr. 13, 1984) (decision and order determining motion to dismiss), the court held that a contractor shared the sovereign immunity of the United States for injuries sustained by an arrestee during an arrest made under the direction of an installation commander. Where, however, an arrestee is beaten in the course of an arrest and the assault was not a necessary part of the arrest, the contractor was not immune to suit.

896.AR 210-10, para. 2-23a.

897.Id. See also Mil. R. Evid. 313(b).

898.AR 210-10, para. 2-23c(3)(b).

899.Id.

900.AR 210-10, para. 2-23c(3)(c). See DAJA-AL 1973/5037 (29 Nov. 1973); DAJA-AL 1970/4891 (13 Nov. 1970).

901.AR 210-10, para. 2-23c(3)(a).

902.AR 210-10, para. 2-23c(1). See JAGA 1956/8555 (26 Nov. 1956).

903.See Mil. R. Evid. 314(g).

904.See Mil. R. Evid. 314(e)

905.See Mil. R. Evid. 315.

906.547 F.2d 863 (5th Cir. 1977). See also United States v. Mathews, 431 F. Supp. 70 (D. Colo. 1976).

907.547 F.2d at 866.

908.396 F. Supp. 890 (D. Md. 1975).

909.396 F. Supp. at 898.

910.Id.

911. 396 F. Supp. at 900 (citing United States v. Vaughan, 475 F.2d 1262, 1264 (10th Cir. 1973)). See United States v. Jenkins, 986 F. 2d 76 (4th Cir. 1993) (No probable cause needed for warrantless search on closed military installation). See also JAGA 1963/3995 (12 July 1963), 134 Judge Advocate Legal Service 6 (1963) (written consent to search can be condition of civilian employment in critical area); DAJA-AL 1970/4891 (13 Nov. 1970) (military necessity warrants searches in restricted areas).

912.396 F. Supp. at 901.

913.18 U.S.C. ✍7(3).

914.United States v. Erdos, 474 F.2d 157 (4th Cir.), cert. denied, 414 U.S. 876 (1973).

915.United States v. Blunt, 558 F.2d 1245, 1247 (5th Cir. 1977) (citing id. at 159).

916.United States v. Bowers, 660 F.2d 527 (5th Cir. 1981) (child abuse committed on Fort Benning); United States v. Piggie, 622 F.2d 486 (10 Cir. 1980) (sodomy on Fort Leavenworth); United States v. Lavender, 602 F.2d 639 (4th Cir. 1979) (offense committed on Blue Ridge Parkway in Virginia); United States v. Blunt, 558 F.2d 1245 (5th Cir. 1977) (assault at Federal Correctional Institution in Kentucky); United States v. Benson, 495 F.2d 475 (5th Cir.), cert. denied, 419 U.S. 1035 (1974) (robberies at Fort Rucker); United States v. Carter, 430 F.2d 1278

(10th Cir. 1970) (assault at Lowry Air Force Base). See Fed. R. Evid. 201.

917.17 M.J. 207 (C.M.A. 1984).

918.18 U.S.C. ✍1201(a)(2). The kidnapping statute, unique among the major common law crimes in title 18, "proscribes one crime, with four jurisdictional bases, interstate or foreign commerce, maritime or territorial jurisdiction, special aircraft jurisdiction and foreign guests of the Government." United States v. Lewis, 662 F.2d 1087, 1090 (4th Cir. 1981), cert. denied), 455 U.S. 955 (1982), cited in United States v. Scholten, 17 M.J. 171, 173 (C.M.A. 1984). Relying on the territorial jurisdictional base, the United States charged the Federal offense of kidnapping under UCMJ art. 134 which makes punishable "crimes and offenses not capital." The proper way to charge kidnapping is under art. 134, para. 92, pt. IV, MCM, 1984.

919.17 M.J. at 214-215 (quoting Mil. R. Evid. 201(b)).

920.United States v. Bowers, 660 F.2d 527 (5th Cir. 1981), cited in United States v. Williams, 17 M.J. 207, 213 (C.M.A. 1984). See also DA Pam 27-22, Military Criminal Law Evidence, chap. 15.

921. 18 U.S.C. ✍81 (arson), 113 (assault), 114 (maiming), 661 (theft), 662 (receiving stolen property), 1111 (murder), 1112 (manslaughter), 1113 (attempt to commit murder or manslaughter); 1201 (kidnapping--see supra note 925; 1363 (destruction of property); 2111 (robbery).

922.18 U.S.C. ✍13. See generally Garver, The Assimilative Crimes Act Revisited: What's Hot, What's Not, The Army Lawyer, Dec. 1987, at 12.

923.Report, supra para. 2-5b, 135 n.6. For examples of serious crimes prosecuted under the Act, See United States v. Gill, 204 F.2d 740 (7th Cir. 1953) (sodomy); Dunaway v. United States 170 F.2d 11 (10th Cir. 1948) (burglary); United States v. Heard, 270 F. Supp. 198 (W.D. Mo. 1967) (carrying concealed weapon); United States v. Titus, 64 F. Supp. 55 (D.N.J. 1946) (embezzlement).

924.See Puerto Rico v. Shell Co., 302 U.S. 253, 266 (1937).

925.United States v. Wright, 28 F. Cas 791 (D. Mass. 1871) (No. 16,774).

926.355 U.S. 286 (1958).

927.United States v. Andem, 158 F. 996 (D.N.J. 1908).

928.McCoy v. Pescor, 145 F.2d 260 (8th Cir. 1944), cert. denied, 324 U.S. 868 (1945).

929.United States v. Press Publishing Co., 219 U.S. 1, 9 (1911); Hockenberry v. United States, 422 F.2d 171 (9th Cir. 1970). See United States v. Irvin, 21 M.J. 184 (C.M.A. 1986); United States v. Dunn, 545 F.2d 1281 (10th Cir. 1976). A Federal regulation having the force of law also makes the State law inapplicable. United States v. Hall, 979 F.2d 320 (3rd Cir. 1992). Compare United States v. Robinson, 495 F.2d 30 (4th Cir. 1974).

930.United States v. Irvin, 21 M.J. 184 (C.M.A. 1986).

931.327 U.S. 711 (1946). See also United States v. Butler, 541 F.2d 730 (8th Cir. 1976).

932.327 U.S. at 717. Compare United States v. Eades, 615 F.2d 617 (4th Cir. 1980) (Federal crime of assault precluded assimilation of Maryland crime of "sexual offense in third degree"). But cf. United States v. Smith, 574 F.2d 988 (9th Cir. 1978) (Federal prisoners convicted for homosexual rape under assimilated State law despite existence of Federal assault statute); Field v. United States, 438 F.2d 205 (2d Cir. 1971) (prosecution under assimilated State law for maliciously shooting with intent to kill upheld, despite Federal statute on assault with intent to commit murder). See United States v. Johnson, 967 F.2d 1431 (10th Cir. 1992) (New Mexico aggravated Assault statute could be assimilated where federal assault statute required specific intent and state statute did not). See United States v. Lewis, 1994 U.S. Dist. LEXIS 4531 (W.D. La. Apr. 5, 1994). See also United States v. Walker, 552 F.2d 566 (4th Cir. 1979) (UCMJ art. 111 not an act of Congress within the meaning of Assimilative Crimes Act. Permissible to charge soldier in Federal Court with drunk driving under State statute); United States v. Marea, 795 F.2d 1094 (1st Cir. 1986) (Sailors may be charged under Assimilative Crimes Act for drunk driving despite UCMJ art. 111).

933.See, e.g., United States v. Peck, 545 F.2d 962 (5th Cir. 1977) (reversing trespass conviction for illegal landing by private plane on Barksdale Air Force Base).

934.694 F.2d 628 (9th Cir. 1982).

935.694 F.2d at 630-631 (quoting United States v. Barner, 195 F. Supp. 103, 105 (N.D. Cal. 1961)).

936.694 F.2d at 631. See also United States v. Dreos, 156 F. Supp. 200 (D. Md. 1957); United States v. Watson, 80 F. Supp. 649 (E.D. Va. 1948). Cf. 42 Comp. Gen. 593 (1963) (roads through Joshua Tree National Monument are not "public highways" of California for tax purposes).

937.JAGA 1969/4557 (19 Dec. 1969).

938.But see DAJA-AL 1977/6340 (30 Jan. 1978) (State statute giving "commanding officer of a U.S. military installation" authority to alter maximum speed limits under State law could be assimilated).

939.Mag. Nos. 8-74-2136M, 8-75-1001M (D. Md., filed Oct. 3, 1975). This unreported opinion denied motions to dismiss or for judgments of acquittal of Church, charged with going through a stop sign, and Metcalf, charged with speeding, as described in the text.

940.Id. Accord United States v. Hillebrand, Mag. No. 76-536-M5, 76-618-M5 (D. Kan. filed Dec. 13, 1977) (defendants convicted of speeding on Fort Riley in violation of speed limits set by commander). See also United States v. Machen, Mag. No. Petty A 225863 (E.D. Va., Apr. 21, 1978) (citation for speeding at Arlington Hall Station dismissed because speed limit was not set either in accordance with State law or AR 190-5).

941.See supra para. 2-12. But see Paul v. United States, 371 U.S. 245 (1963). Logically extended, Paul could require adoption of even State laws which are primarily regulatory in nature.

942.321 U.S. 383 (1944).

943.321 U.S. at 389 n.8.

944.DAJA-AL 1976/5788 (15 Nov. 1976) (Kentucky child abuse statute requiring reporting of child abuse incidents would be assimilated on Fort Knox in the absence of Army regulation precluding assimilation).

945.85 F. Supp. 545 (E.D. Va. 1949).

946.81 F. Supp. 611 (E.D. Va. 1949).

947.Letter from Asst. U.S. Att'y Gen., Criminal Division, to Secretary of Defense, April 29, 1955. See also Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 390 n.9 (1944) (noting that it is open to question whether War Department could, consistent with the scope of Federal statutes delegating this regulatory power, write regulations allowing liquor transactions on military installations).

948.JAGA 1955-4833 (2 June 1955). AR 215-2, paras. 3-30 and 3-31 provide that bingo and Monte Carlo games can be held on exclusive jurisdiction installations but not on concurrent jurisdiction or proprietorial interest installations where State law does not permit (note that 15 U.S.C. ✍1175 prohibits gambling devices on either exclusive or concurrent jurisdiction land). Because AR 215-2 authorizes gaming on exclusive jurisdiction installations, a State law prohibiting gaming that would normally operate on the post will not be assimilated. Because AR 215-2 does not authorize gaming on other installations, State law will be assimilated on concurrent jurisdiction installations. Note that AR 215-2 could authorize gambling on any military installation. See DAJA-AL 1981/3952 (16 Oct. 1981) (noting that the predecessor regulation to AR 215-2 was the product of policy rather than law). On a concurrent jurisdiction installation, such a regulation would preclude assimilation of State law as Federal law under the Assimilative Crimes Act and, on both concurrent jurisdiction and proprietorial interest installations, it would preempt State law which would otherwise operate directly on the installation.

949.Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484 (1942), held that Army regulations have the force of law. JAGA 1964/4031 (12 June 1964), relying on Standard Oil, concluded that post traffic regulations cannot preclude assimilation. Standard Oil does not compel this result and, consequently, the issue has not been recently considered.

950.See United States v. Keys, 392 F. Supp. (W.D. Wis. 1975).

951.E.g., chap. 136, 1979 Washington Laws, 1979 Wash. Leg. Svc. 1329, 1331 (West).

952.40 U.S.C. ✍318a.

953.40 U.S.C. ✍318a, 318c. This is not an unconstitutional delegation of legislative power to the Administrator. See United States v. Cassignol, 420 F.2d 868 (4th Cir. 1970).

954.40 U.S.C. ✍318b. The Administrator's authority to write regulations over property under his or her direct control is unrelated to legislative jurisdiction. Nevertheless, Congress has placed the limitation on delegations to other agencies, requiring that there be legislative jurisdiction. Cf. United States v. Gliatta, 580 F.2d 156 (5th Cir. 1978).

955.DOD Dir. 5525.4, Enforcement of State Traffic Laws on DOD Installations, para. B3 (Nov. 2, 1981) (codified at 32 C.F.R. 210.1-4). AR 190-5, para. 4-3d implements the directive. See also 32 C.F.R. 634.4(c)(4).

956.DOD Dir. 5525.4, para. C2.

957.21 U.S.C. ✍801-966. Possession, possession with intent to manufacture or distribute, manufacture, dispensing, and distribution of controlled substances or counterfeit substances are punishable under the Act. 21 U.S.C. ✍841(a). Controlled substances are categorized in five schedules (I-V) by the Administrator of the Drug Enforcement Administration under authority of the Attorney General. 21 C.F.R. 1308.01-51. Categorization is dependent on the extent to which a substance has a medicinal use. Penalties depend generally on the category in which a drug is listed. Simple first time possession of any drug is punishable by imprisonment for up to one year and a fine up to $5,000. 21 U.S.C. ✍844. The same punishment applies to manufacture, distribution, or possession with an intent to do either of Schedule V substances or free distribution of a small amount of marijuana. 21 U.S.C. ✍841(b)(3), 841(b)(4).

958.United States v. Lopez, 459 F.2d 949, 954-955 (5th Cir.), cert. denied, 409 U.S. 878 (1972)

959.Id.

960. 21 U.S.C. ✍881. The forfeiture procedure, contained in 21 C.F.R. 1316.71-81 allows officers of the Drug Enforcement Administration (DEA) and the FBI to seize property and appraise it. Property whose value does not exceed $10,000 is forfeited after general publication for three weeks. 21 C.F.R. 1316.75. Property in excess of that amount must be condemned in district court. 21 C.F.R. 1316.78. Installation law enforcement personnel should be encouraged to pursue forfeiture action through the DEA in appropriate cases. Contact between military investigative authorities and DEA concerning forfeitures does not violate 18 U.S.C. ✍1385.

961.Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes, signed by the Attorney General and Secretary of Defense on 14 Aug. and 22 Aug. 1984, respectively.

962.Id. at para. 2. See also AR 27-10, chap. 2.

963.18 U.S.C. ✍3401(a). See generally M. Franks, Prosecution in Civil Courts of Minor Offenses Committed on Military Installations, 51 Mil. L. Rev. 85 (1971); Garver, A Legal Guide to Magistrate's Court, The Army Lawyer, Aug. 1987, at 27. A useful tool for magistrate court prosecutors to have is Administrative Office of U.S. Courts, Legal Manual for United States Magistrates.

964.See AR 27-40, para. 6-5.

965.AR 27-40, para. 6-3.1. art. 6(d), UCMJ.

966.18 U.S.C. ✍340(b). Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates, rule 2(b) (hereinafter Mag. R. Pro.).

967.18 U.S.C. ✍3401(e); Mag. R. Pro. 5.

968.18 U.S.C. ✍3402; Mag. R. Pro. 1(b). A petty offense is one for which the maximum penalty is a $500 fine and imprisonment for six months. 18 U.S.C. ✍1(3).

969.Mag. R. Pro. 4(a). See Fed. R. Crim. Pro. 3 (complaint), 7 (indictment and information).

970.Mag. R. Pro. 4(a). Most offenses brought before a magistrate are initiated by issuance of a DD Form 1805 violation notice. See AR 190-29. Installation law enforcement officials must determine which offenses require a mandatory appearance before a magistrate by coordination through the staff judge advocate with the magistrate and district court since this information is recorded on the DD Form 1805 when issued to a violator. AR 190-29, paras. 7, 9. Army law enforcement agencies will not accept fines or collateral or take action concerning nonpayment delinquencies. AR 190-29, para. 10. Military police cannot serve the legal process of the magistrate or take into custody offenders sentenced to confinement by the magistrate as these actions would violate 18 U.S.C. ✍1385. DAJA-AL 1975/3890 (5 June 1975), digested in 75-7 Judge Advocate Legal Service 31. Service of a violation notice does not, however, constitute service of the magistrate's process.

Soldiers who are subjected to the magistrate's jurisdiction will not be punished under the UCMJ. AR 190-29, para. 14. In most cases, a soldier can be charged under either Federal law or the UCMJ. AR 190-29, para. 14, instructs installation commanders to establish policies on how to refer soldiers to the magistrate when an act is an offense under both Federal law and the UCMJ. Such policies must be consistent with directives of higher headquarters. It is the
policy of the U.S. Army Training and Doctrine Command (TRADOC) that "each installation commander may decide the manner and means to be used in disposing of traffic offenses committed by military personnel on their installation;" but, "[i]t is expected that the US magistrate system will be used where available." Message from Commander, TRADOC, Subject: Article 15 Jurisdiction of Traffic Offenses 041400Z Sept. 1981. It is the policy of the U.S. Army Forces Command (FORSCOM) to use the magistrate "wherever feasible" for "minor offenses of a civil nature committed by members of the Army, including violations of State traffic laws made applicable to the military reservation." Letter from Commander, FORSCOM, Subject: Support of Federal Magistrate System by Installation Commanders (23 Jan. 1978). Within these limitations, discretion rests with the installation commander and not the magistrate to determine which offenses will be channeled into the Federal courts and which will remain within the military justice system. Where a soldier is charged in magistrate court, convicted, and fined, DD Form 139 can be used by the soldier to initiate a voluntary pay deduction as the result of an initiative by Fort Riley, approved by the Director of Finance and Accounting, U.S. Army Finance and Accounting Center, on 19 Sept. 1979. Letter from Major General R.G. Fazakerly to Commander, FORSCOM, Subject: DD Form 139, Voluntary
Pay Deductions (19 Sept. 1979).

971. 18 U.S.C. ✍3402; Mag. R. Pro. 7. The defendant is not entitled to a de novo appeal to the district court. Mag. R. Pro. 7(e).

972.Mag. R. Pro. 3(a).

973.18 U.S.C. ✍3401(f).

974.Id. See C.F.R. 52.02(b).

975.A juvenile is a person who is not yet 18. Persons who are not yet 21 can be treated as juveniles where the offense with which

they are charged was committed before the age of 18. 18 U.S.C. ✍5031.

976.Whether the State has jurisdiction is largely a question of subject matter jurisdiction over the offense. Exclusive Federal legislative jurisdiction is not a bar to the exercise of State jurisdiction where military authorities agree to the State's exercise of its jurisdiction. See State in Interest of D.B.S., 349 A.2d 105 (N.J. Super. Ct. 1975). Cf. U.S. Attorney's Manual, ✍9-8.110 (speaking of exclusive and concurrent jurisdiction, but not necessarily in the sense of legislative jurisdiction).

977.18 U.S.C. ✍5032. The Attorney General, vested with the power to certify, has delegated the power to United States attorneys generally. U.S. Attorney's Manual, ✍9-8.100, 110. See United States v. Daye, 696 F.2d 1305 (11th Cir. 1983); United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976). The major purpose of the Juvenile Delinquency Act is to encourage greater State action in juvenile matters. U.S. Attorney's Manual, ✍9-8.120.

978. 18 U.S.C. ✍5032.

979. 18 U.S.C. ✍3401(g). Certification can follow filing of a complaint and issuance of an arrest warrant but must precede the filing of an information. U.S. Attorney's Manual, ✍9-8.120.

980. 18 U.S.C. ✍3401(g). Note that there are other restrictions where juveniles are concerned. Fingerprinting, photographing, and release of a juvenile's name without the court's consent is prohibited. 18 U.S.C. ✍5038(d).

981.18 U.S.C. ✍5032.

982.18 U.S.C. ✍5032; U.S. Attorney's Manual ✍9-8.130.

983.AR 500-50, Civil Disturbances, paragraph 1-2a.

984.AR 500-50, paragraph 1-2b.

985.AR 252-13, Glossary, and DOD 3025.12-D, paragraph IVB. Physical Security UPDATE, Consolidated Glossary ("terrorism").

986.AR 500-50, paragraph 1-2c.

987.AR 500-50, paragraph 1-2d.

988.AR 500-50, paragraph 1-2f.

989.AR 500-60, Disaster Relief, appendix A, paragraph A-13.

990.46 C.J.S. Insurrection and Sedition ✍1a (1946).

991.AR 310-25, Dictionary of United States Army Terms, page 150.

992.AR 500-60, appendix A, paragraph A-11.

993.AR 500-51, Support to Civilian Law Enforcement, paragraph 1-3b.

994.AR 500-60, appendix A, paragraph A-17.

995.AR 500-60, appendix A, paragraph A-10.

996.AR 500-51, paragraph 1-4a.

997.18 U.S.C. ✍1385.

998.Black's Law Dictionary 1046 (5th ed. 1979).

999.Furman, Restriction Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85 (1960). See also Rice, New Laws and Insights Encircle the Posse Comitatus Act, 104 Mil. L. Rev. 109 (1984); Hilton, Recent Developments Relating to the Posse Comitatus Act, The Army Lawyer, Jan. 1984, at 1; and Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83 (1975), for a comprehensive treatment of the subject of military assistance to civil law enforcement officials.

1000.18 U.S.C. ✍1385.

1001.Dep't of Defense Directive No. 5525.5, DOD Cooperation with Civilian Law Enforcement Officials, encl. 4, sec. C2 (22 March 1982) [hereinafter DOD Dir. 5525.5]. Secretary of the Navy Instruction No. 5820.7A, subject: Cooperation with Civilian Law Enforcement Officials; Posse Comitatus Act (13 December 1984), made the prohibition of the Posse Comitatus Act applicable to Navy and Marine Corps personnel unless their involvement in executing local, state, or federal law was authorized by the Secretary of the Navy or was permissible under the Constitution or Act of Congress.

1002.AR 500-51, paragraph 3-2.

1003.See 14 U.S.C. ✍2. The primary duties of the Coast Guard lie in the enforcement of all applicable federal laws within its statutorily described jurisdiction.

1004.18 U.S.C. ✍1385.

1005.Taylor v. State, 645 P.2d 522 (Okla. 1982). Military intervention was excessive where drug suppression team member acted undercover to target civilian drug source, was provided drug purchase monies and wired for sound by civilian police, pulled his service revolver during arrest, participated in search of civilian defendant's home, and seized the evidence, which he later submitted directly to civilian crime laboratory. PCA was violated and evidence was excluded.

1006.United States v. Walden, 490 F.2d 372 (4th Cir. 1974). Evidence was not excluded where three marines were used as undercover agents to investigate store that was suspected of selling firearms to minors and non-residents, in contravention of state laws. Despite violation of Secretary of the Navy Instruction, practice was not so widespread such that exclusion would act as a deterrent. State v. Danko, 548 P.2d 819 (Kan. 1976). Evidence was not excluded where military policeman participated in search of armed robbery suspect's car at request of civilian law enforcement official with whom he was conducting a joint patrol pursuant to city/military program.

1007.U.S. Const. amend IV.

1008.See, e.g., United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974). Defendant was prosecuted for obstructing federal law enforcement officers in the lawful performance of their duties in violation of 18 U.S.C. ✍231(a)(3). The court held that the government had failed to carry its burden of proving that the actions of marshals and FBI agents were lawful in view of material contribution of military personnel to their containment operation in connection with a civil disorder in the village of Wounded Knee on the Pine Ridge Reservation in South Dakota in March 1973.

1009.28 U.S.C. ✍✍2671-2680.

1010.28 U.S.C. ✍2679.

1011.See, e.g., Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961). In Wrynn, an Air Force commander provided a helicopter and crew to a sheriff for his use in searching for escaped civilian prisoners. During the search the helicopter's rotor struck a tree which resulted in injury to a civilian bystander named Wrynn. A claim was filed against the federal Government under the federal Tort Claims Act. On the issue of whether Wrynn's injuries were caused by a federal employee acting within the scope of his office or employment, the court held that the use of the Air Force helicopter crew in the execution of state law was a violation of the Posse Comitatus Act and that the crew members were consequently not acting within the scope of employment when Wrynn was injured. As a result of this ruling, the individual crew members, and not the United States, faced personal tort liability for Wrynn's injuries.

1012.Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986) (en banc), aff'd for lack of a quorum, 108 S. Ct. 1253 (1988). A number of residents of Wounded Knee, South Dakota, brought a suit in federal court to recover damages for allegedly having been kept from their homes or forcibly confined due to federal law enforcement activities directed and supervised by the defendants during the Indian occupation of Wounded Knee in 1973.
The plaintiffs claimed, inter alia, that the use of military personnel in civilian law enforcement violated the Posse Comitatus Act and therefore entitled them to damages. Finding that a violation of the Posse Comitatus Act would not give rise to a civil cause of action, the court held that the complaint failed to state a cause of action. The Court of Appeals reversed. On review, the Supreme Court affirmed for lack of a quorum when Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Scalia disqualified themselves without explanation.

1013.AR 500-51, paragraph 3-4a.

1014.The Military Purpose Doctrine is a concept that has been developed over the years through opinions of The Judge Advocate General of the Army. In this regard, see the following opinions of The Judge Advocate General: JAGA 1956/8555, 26 Nov. 1956; JAGA 1959/1745, 16 Feb. 1959; DAJA-AL 1973/5259, 4 Jan. 1974; DAJA-AL 1979/2893, 27 Jun. 1979.

1015.AR 500-51, paragraph 3-4a.

1016.AR 500-51, paragraph 3-4b.

1017.AR 500-51, paragraph 3-4d.

1018.10 U.S.C. ✍373.

1019.10 U.S.C. ✍374.

1020.10 U.S.C. ✍✍331-333.

1021.AR 500-51, paragraph 3-5.

1022.AR 500-51, paragraph 3-10.

1023.AR 500-51, paragraph 3-1.

1024.AR 500-51, paragraph 2-1.

1025.AR 500-51, paragraph 2-3.

1026.AR 500-51, paragraph 2-5.

1027.AR 500-51, paragraph 2-5b(1).

1028.DA message 292016Z Aug 83. Subj: Problems associated with the interpretation of AR 500-51.

1029.AR 500-51, paragraph 2-5c.

1030.AR 500-51, paragraph 2-5d.

1031.AR 500-51, paragraph 4-1.

1032.31 U.S.C. ✍1535.

1033.AR 500-51, paragraph 4-4a.

1034.10 U.S.C. ✍2667.

1035.AR 500-51, paragraph 4-5b.

1036.DOD 3025.12-D, section V.A.

1037.U.S. Const. art. IV, Section 4.

1038.10 U.S.C. ✍331.

1039.AR 500-50, paragraph 2-3a.

1040.Id.

1041.U.S. Const. art. II, Section 3.

1042.10 U.S.C. ✍332.

1043.U.S. Const. amend. XIV.

1044.10 U.S.C. ✍333.

1045.10 U.S.C. ✍334.

1046.AR 500-50, paragraph 2-3b.

1047.Id.

1048.AR 500-51, paragraph 3-4b(2).

1049.AR 500-51, paragraph 3-4a(3).

1050.See 18 U.S.C. ✍1382.

1051.AR 500-50, paragraph 2-4a.

1052.AR 500-50, paragraph 2-7.

1053.AR 500-50, paragraph 2-3a. The responsibility for the management of the federal response to acts of terrorism in the United States rests with the Attorney General. This responsibility and the responsibility of DOD and the FBI are detailed in a Memorandum of Understanding executed in the Summer of 1983, the title of which is Use of federal Military Force in Domestic Terrorist Incidents. See infra Appendix A.

1054.AR 500-50, paragraph 2-3a.

1055.FM 19-15, Civil Disturbances, paragraph 2-2a.

1056.AR 500-50, paragraph 3-1.

1057.AR 500-50, paragraph 3-1a.

1058.AR 500-50, paragraph 3-1b. See also FM 19-15, paragraph 2-2d.

1059.FM 19-15, paragraph 2-2d.

1060.FM 19-15, paragraph 2-2e.

1061.FM 19-15, paragraph 2-2e(2).

1062.AR 500-50, paragraph 3-3. See also FM 19-15, paragraph 2-2f.

1063.FM 19-15, paragraph 2-2f(2).

1064.AR 500-50, paragraph 2-3a.

1065.AR 500-50, paragraph 3-3c.

1066.FM 19-15, paragraph 4-12a. See also Murray, Civil Disturbance, Justifiable Homicide and Military Law 54 Mil. L. Rev. 129 (1971).

1067.FM 19-15, paragraph 4-12b.

1068.AR 500-50, paragraph 1-3d. See also FM 19-15, paragraph 2-11. In addition to the requirements of AR 500-50 concerning detaining civilians, the provisions of Department of the Army Civil Disturbance Plan (Garden Plot (U)) must be strictly observed.

1069.AR 500-50, paragraph 1-3d.

1070.AR 500-50, paragraph 3-3. See FM 19-15, paragraph 2-1b for a discussion of searches during civil disturbances. Searches of females must conform with the procedures specified in FM 19-15, paragraph 5-18.

1071.FM 19-15, paragraph 7-36. Maximum utilization of federal, state, or local public property is desirable from the standpoint of minimizing claims for property damage.

1072.18 U.S.C. ✍231-233.

1073.AR 500-50, paragraph 2-9.

1074.42 U.S.C. ✍5121-5189.

1075.AR 500-60, Disaster Relief, paragraph 2-1a.

1076.42 U.S.C. §§5121-5189.

1077.AR 500-60, paragraph 1-5b(1).

1078.AR 500-60, paragraph 1-6a.

1079.AR 500-60, paragraph 2-11a.

1080.AR 500-60, paragraph 2-11b.

1081.AR 500-60, paragraph 1-6c.

1082.AR 500-60, paragraph 2-11c.

1083.AR 500-60, paragraph 2-11c(2).

1084.AR 500-60, paragraph 2-11d.

1085.AR 500-60, paragraph 2-10.

1086.AR 500-60, paragraph 2-11e.

1087.AR 500-60, paragraph 2-11f.

1088.AR 500-60, paragraph 2-13.

1089.AR 500-60, paragraph 2-14.

1090.AR 500-60, paragraphs 2-1f and g.

1091.See supra Chapter 3, Section II.

1092.AR 500-60, paragraph 5-2a.

1093.AR 500-60, paragraph 5-3b.

1094.AR 500-60, paragraph 1-5b(8). See also AR 500-60, paragraph 7-1a.

1095.AR 500-60, paragraph 7-1b.

1096.AR 500-60, paragraph 7-2a.

1097.AR 500-60, paragraph 7-2d.

1098.AR 500-60, paragraph 7-2e.

1099.31 U.S.C. ✍1535.

1100.10 U.S.C. ✍✍4742, 9742.

1101.AR 500-4, Military Assistance to Safety and Traffic (MAST), paragraph 3.

1102.AR 500-4, paragraph 3e.

1103.AR 500-4, paragraph 3i.

1104.AR 500-4, paragraph 4b.

1105.AR 500-4, paragraph 4e.

1106.AR 500-4, paragraph 6a.

1107.AR 500-4, paragraph 4f.

1108.18 U.S.C. ✍1385.

1109.AR 500-51, paragraph 3-5.

1110.AR 500-51, paragraph 3a.

1111.Id. See also AR 500-51, paragraph 3-10 and section II of this chapter, which addresses action of military personnel taken for a lawful purpose (such as humanitarian assistance) that also incidentally assist civilian law enforcement officials.

1112.28 U.S.C. ✍✍2671 et seq.

1113.28 U.S.C. ✍2679.

1114.Military personnel acting in violation of the Posse Comitatus Act (18 U.S.C. ✍1385) have been held not to have been acting within the scope of employment under the Federal Tort Claims Act. Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961). See the discussion of the Wrynn case at footnote 16 of Section II of this chapter.

1115.28 U.S.C. ✍2679(b). See also Dep't of the Army, Pamphlet No. 27-162, Claims, Chap. 3 (1977) for a more detailed discussion of the Federal Tort Claims Act and Drivers Act.

1116.AR 500-2, Search and Rescue (SAR) Operations, paragraph 4b.

1117.AR 500-2, para. 3a.

1118.AR 500-2, paragraph 3e(1).

1119.AR 500-2, paragraph 3e(2).

1120.AR 500-2, paragraph 3e(3).

1121.AR 500-2, paragraph 3l.

1122.AR 500-2, paragraph 3f.

1123.AR 500-2, paragraph 6.

1124.AR 500-2, paragraph 6d.

1125.AR 500-2, paragraph 4g(3).

1126.AR 500-2, paragraph 6d.

1127.AR 75-15, Responsibilities and Procedures for Explosive Ordinance Disposal, paragraph 2-1b.

1128.AR 75-15, paragraph 2-2a.

1129.AR 75-15, paragraph 2-7a.

1130.AR 75-15, paragraph 2-7b.

1131.AR 75-15, paragraph 3-2a.

1132.AR 75-15, para. 3-2b.

1133.AR 75-15, paragraph 3-2c.

1134.AR 75-15, paragraph 3-2c(1).

1135.AR 75-15, paragraph 3-2c(2).